

Courts and the Abolition Movement

Matthew Clair* & Amanda Woog**

This Article theorizes and reimagines the place of courts in the contemporary struggle for the abolition of racialized punitive systems of legal control and exploitation. In the spring and summer of 2020, the killings of George Floyd, Breonna Taylor, and many other Black and Indigenous people sparked continuous protests against racist police violence and other forms of oppression. Meanwhile, abolitionist organizers and scholars have long critiqued the prison-industrial complex, or the constellation of corporations, media entities, governmental actors, and racist and capitalist ideologies that have driven mass incarceration. But between the police and the prison cell sits the criminal court. Criminal courts are the legal pathway from an arrest to a prison sentence, with myriad systems of control in between, including ones branded as “off-ramps.” We cannot understand the present crisis without understanding how the criminal courts not only function to legitimate police and funnel people into carceral spaces but also contribute their own unique forms of violence, social control, and exploitation. These mechanisms reveal the machinations of mass criminalization and the injustices operating between the police encounter and the prison cell. Our central argument is that courts—with a focus here on criminal trial courts and the group of actors within them—function as an unjust social institution. We should therefore work toward abolishing criminal courts and replacing them with other institutions that do not inherently legitimate police, rely on jails and prisons, or operate as tools of racial and economic oppression.

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Drawing on legal scholarship and empirical social scientific research, Part I describes injustices perpetrated by criminal courts, detailing their role in the present crisis of mass criminalization through legal doctrine, racialized social control and violence, and economic exploitation. Part II describes the contemporary abolition movement, briefly laying out its genesis and three guiding principles typically considered in relation to policing and prisons: (1) power shifting, (2) defunding and reinvesting, and (3) transformation. Part III explores how these principles could operate in relation to the courts, drawing on analysis of existing grassroots efforts and offering new possibilities. In the short term, non-reformist reforms could make criminal courts a venue to unmask, and therefore aid in dismantling, police and prisons. Such reforms could complement the broader abolition movement and reduce the churn of people through the criminal legal system. Ultimately, the goal is to abolish criminal courts as sites of coercion, violence, and exploitation and to replace them with other social institutions, such as community-based restorative justice and peacemaking programs, while investing in the robust provision of social, political, and economic resources in marginalized communities.

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INTRODUCTION

Just after midnight on March 13, 2020, Breonna Taylor, a 26-year-old Black woman and health care worker, was shot and killed by three Louisville,

School, especially Paul Heaton and John Hollway, for having the foresight to put us in an office together for a year.

Kentucky, police officers who had forced their way into her apartment.¹ When the officers barged through her door that night, Ms. Taylor and her boyfriend, Kenneth Walker, were awoken from their sleep.² Afraid they were being robbed, Mr. Walker shot once at the plainclothes officers in self-defense. The officers returned fire with thirty-two bullets.³ Some of those bullets went through walls of the apartment to neighboring homes, where families with children lay awake, terrified for their lives. Six hit Ms. Taylor, killing her.⁴

The officers were executing one of several “no-knock” warrants related to a drug trafficking case against Taylor’s ex-boyfriend, who lived across town.⁵ Louisville Detective Joshua Jaynes claimed the no-knock warrant, which authorizes police to enter and search a place without announcing themselves, was necessary because it was possible a drug dealer was receiving packages containing drugs or drug proceeds at Ms. Taylor’s apartment. Media later reported that Jaynes knew the packages he had suggested might contain drugs were “Amazon or mail.”⁶ The language in the affidavit supporting the no-knock warrant for Ms. Taylor’s apartment was boilerplate and fell far below the legal

1. Darcy Costello & Tessa Duvall, *Who Are the Louisville Officers Involved in the Breonna Taylor Shooting? What We Know*, LOUISVILLE COURIER J. (May 16, 2020), <https://www.courier-journal.com/story/news/politics/metro-government/2020/05/16/breonna-taylor-shooting-what-we-know-louisville-police-officers-involved/5200879002> [<https://perma.cc/AB88-N329>].

2. See Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/QSM6-D8AW>].

3. Malachy Browne, Anjali Singhvi, Natalie Reneau & Drew Jordan, *How the Police Killed Breonna Taylor*, N.Y. TIMES (Dec. 28, 2020), <https://www.nytimes.com/video/us/100000007348445/breonna-taylor-death-cops.html?action=click&module=Top%20Stories&pgtype=Homepage> [<https://perma.cc/6B5J-VC27>].

4. *Id.*

5. *Id.*

6. Tessa Duvall & Ben Tobin, *Louisville Detective Who Obtained No-Knock Search Warrant for Breonna Taylor Reassigned*, LOUISVILLE COURIER J. (June 10, 2020), https://www.courier-journal.com/story/news/local/2020/06/10/breonna-taylor-louisville-detective-joshua-jaynes-no-knock-warrant-reassigned/5333604002/?_ga=2.246644292.1731185841.1597684423-767844262.1597684423 [<https://perma.cc/62ZS-ZML6>]. Later reporting casts doubt on the officers’ claims of suspicious packages, stating “according to newly released transcripts of interviews with Louisville police officers, they knew a month before they invaded Taylor’s home that Glover’s packages contained neither [narcotics nor proceeds from the sales of narcotics].” Jacob Sullum, *A Month Before Louisville Drug Warriors Killed Breonna Taylor, They Knew the “Suspicious Packages” She Supposedly Was Receiving Came from Amazon*, REASON (Oct. 9, 2020), <https://reason.com/2020/10/09/a-month-before-louisville-drug-warriors-killed-breonna-taylor-they-knew-the-suspicious-packages-she-supposedly-was-receiving-came-from-amazon> [<https://perma.cc/M37L-KB3R>].

standard actually required for such warrants.⁷ A state circuit court judge signed the five warrants associated with the case in twelve minutes.⁸

Breonna Taylor’s killing by police—along with those of so many other Black and Indigenous people in the spring and summer of 2020, including George Floyd, Tony McDade, and Rayshard Brooks—has sparked continuous protests against racist police violence and other forms of oppression on a level not seen in recent years. Protesters from Portland to New York are demanding more than police reform. Many are demanding abolition of the police alongside robust investments in employment, housing, and healthcare in marginalized communities.⁹ A dollar spent on police is a dollar taken from a library.¹⁰ But the criminal justice crisis extends beyond police.

As much as Breonna Taylor’s death reveals about the crisis of policing, it also reveals the central role judges and other court actors play in sanctioning killings and other forms of state violence and perpetuating and maintaining racial and economic hierarchies. Abolitionist organizers and scholars have long critiqued what has been referred to as the “prison-industrial complex,” or the constellation of corporations, media entities, governmental actors, and racist and capitalist ideologies that have driven mass incarceration.¹¹ Much has been written and said by abolitionists who have scrutinized the tail ends of punitive legal social control—police and prisons. This Article contributes to abolitionist

7. See Radley Balko, Opinion, *The No-Knock Warrant for Breonna Taylor Was Illegal*, WASH. POST (June 3, 2020) <https://www.washingtonpost.com/opinions/2020/06/03/no-knock-warrant-breonna-taylor-was-illegal> [<https://perma.cc/EW7J-U4PM>]; see also *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (“[I]t is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement.”).

8. Jacob Sullum, *Was the Search Warrant for the Drug Raid that Killed Breonna Taylor Illegal?*, REASON (June 21, 2020), <https://reason.com/2020/06/21/was-the-search-warrant-for-the-drug-raid-that-killed-breonna-taylor-illegal> [<https://perma.cc/9GYX-SM4U>].

9. See, e.g., Amna A. Akbar, *How Defund and Disband Became the Demands*, N.Y. REV. BOOKS (June 15, 2020) <https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands> [<https://perma.cc/KH98-5M3Y>] (“Now, more and more, you hear ‘care, not cops.’ That new slogan embodies the abolitionist horizon, not simply to dismantle prisons and policing, but to build alternate forms of community care and collective provision for all.”); Keeanga-Yamahtta Taylor, *We Should Still Defund the Police*, NEW YORKER (Aug. 14, 2020), <https://www.newyorker.com/news/our-columnists/defund-the-police> [<https://perma.cc/Z4GT-ZDH5>] (“The Floyd uprisings have created new urgency in the struggle for genuine safety in working-class Black communities, highlighting the need for well-resourced public services, good and plentiful jobs, and secure and beautiful housing without the menacing presence of the police.”).

10. For example, it was reported that after Breonna Taylor’s killing, the Louisville City Council voted to increase the “police budget by \$750,000 and to cut \$775,000 from local libraries.” Alec Karakatsanis (@equalityAlec), TWITTER (June 29, 2020), <https://twitter.com/equalityAlec/status/1277628248768331777> [<https://perma.cc/34AJ-335E>]; see ERIC KLINENBERG, PALACES FOR THE PEOPLE: HOW SOCIAL INFRASTRUCTURE CAN HELP FIGHT INEQUALITY, POLARIZATION, AND THE DECLINE OF CIVIC LIFE 5, 7, 21–24 (2018) (showing how investments in libraries and other forms of “social infrastructure” are critical for social health and well-being).

11. See ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 84 (2003).

theorizing by dissecting how courts—defined here as the assemblage of legal actors, practices, precedents, and incentives that make up the courtroom workgroup¹²—are an essential component of the carceral state.¹³ Courts legitimate the activities of police and prisons, even legalizing violent and otherwise illegal activities through the creation of legal fictions,¹⁴ while mythologizing themselves as institutions that afford justice. Moreover, criminal courts contribute to unique forms of state violence, social control, and exploitation, which reveal the mass criminalization and injustice that operate between the police encounter and the prison cell. Much of the recent media and scholarly attention around the abolition movement has focused on police abolition and defunding. But organizers and activists on the ground increasingly scrutinize the courtroom workgroup by questioning prosecutorial practices and court-imposed pretrial detention, fines, and fees, indicting the courts as an unjust institution and, more broadly, working to create the conditions for democratic, community-based power and accountability.¹⁵

12. Decades of ethnographic research in sociology and criminology has revealed how courtroom workgroups emerge through the relational actions of various courtroom actors and authorities, who are constrained by the broader environment of laws, judicial precedent, and norms. Thus, our reference to “courts” should not be understood as a reference to the actions or preferences of judges alone, but rather to the collaborative outcome resulting from the actions and preferences of myriad legal authorities and court actors, within and beyond the courtroom. For more on the “courtroom workgroup,” see generally JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* (1977).

13. The term “carceral state” has been useful to describe the shift of government priorities over the last four decades from a modest mid-twentieth century commitment to social welfare toward an immense commitment to the building up of carceral spaces, sites, and logics in the latter part of the twentieth century and into the twenty-first century. As we describe below, we refer to the crisis as one of “mass criminalization” as a way to more precisely indicate how this build up has operated beyond the prison and how social control and exploitation can operate beyond and alongside “carceral” logics. See *infra* note 34 and accompanying text; see also Marie Gottschalk, *Hiding in Plain Sight: American Politics and the Carceral State*, 11 ANN. REV. POL. SCI. 235 (2008) (addressing the rise of the carceral state); Jonathan Simon, *Rise of the Carceral State*, 74 SOC. RSCH. 471 (2007) (same); Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817 (2010) (same).

14. See, e.g., Nathaniel Sobel, *What Is Qualified Immunity, and What Does It Have to Do with Police Reform?*, LAWFARE (June 6, 2020), <https://www.lawfareblog.com/what-qualified-immunity-and-what-does-it-have-do-police-reform> [<https://perma.cc/Y9PJ-93RH>] (“Qualified immunity is a judicially created doctrine that shields government officials from being held personally liable for constitutional violations—like the right to be free from excessive police force—for money damages under federal law so long as the officials did not violate ‘clearly established’ law.”). Courts have interpreted the requirement that an officer violate “clearly established” law to be held liable for their actions to require the same basic fact patterns in the established law and pertinent case, creating an extremely permissive legal fiction. *Id.*

15. See, e.g., *Policy Platform: End the War on Black People*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/end-pretrial-and-money-bail> [<https://perma.cc/SF9M-DJN8>] (describing part of the platform as seeking an end to “pretrial detention and money bail”); Mariame Kaba, *Summer Heat*, NEW INQUIRY (June 8, 2015), <https://thenewinquiry.com/summer-heat/> [<https://perma.cc/4PU8-PBZM>] (including “ending cash bail” on a list of “intermediate steps to shrink the police force and to restructure our relationships with each other”).

Courts are a particularly important institutional component of the prison industrial complex to scrutinize because they are a site that is popularly thought to hold potential for justice. After the police kill a person, protesters and family members often look to the courts for a modicum of justice, demanding accountability through criminal prosecution of police officers or through civil remedies. Turning to the courts is understandable given the few tools available to people seeking justice under our current system and the oft-recited rhetoric of “justice” by powerful court players like prosecutors and judges.¹⁶ But prosecutions of police violence or misconduct are exceedingly rare, and a conviction is even rarer, as recently witnessed in relation to Ms. Taylor’s killing.¹⁷

Moreover, abolitionists have pointed out a contradiction in advocating for police and prison abolition while demanding the arrest, conviction, and imprisonment of police officers, reiterating that the criminal legal system is no site for justice.¹⁸ Criminal courts, as we will detail, far more often perpetrate state violence, including by bolstering police legitimacy and enabling police abuse and violence, such as through the issuance of warrants and through deference to police testimony despite persistent patterns of police fabrication.¹⁹ And court actors themselves—prosecutors, probation officers, judges, and even defense attorneys—silence, oppress, surveil, and further criminalize marginalized communities through practices such as cash bail, probation supervision, coercive plea bargaining, inadequate counsel, and harsh sentencing.²⁰ Thus, in the movement to abolish police and prisons, the courts must also be critiqued using an abolitionist framework, as the court system largely legitimizes and perpetuates the racialized violence and control of police and prisons.

16. Browsing local “crime” stories and district attorney websites inevitably turns up appeals to justice from law enforcement. *See, e.g., Philadelphia Man Charged in New Jersey Fatal Shooting*, U.S. NEWS (Nov. 10, 2020), <https://www.usnews.com/news/best-states/pennsylvania/articles/2020-11-10/philadelphia-man-charged-in-new-jersey-fatal-shooting> [<https://perma.cc/674L-HCB4>]; OFF. OF DIST. ATT’Y: HARRIS CNTY., TEX., <https://app.dao.hctx.net> [<https://perma.cc/4MHK-3F2D>]; JOSÉ GARZA FOR DISTRICT ATTORNEY, <https://www.joseforda.com> [<https://perma.cc/24BQ-J76W>] (promising “a new vision for justice and safety for all”). Note also that institutions and powerful court actors are branded with the word “justice,” it being reserved as a title for judges on the highest courts and used in bureaucratic titles like the “Department of Justice.”

17. The only officer charged in connection with Breonna Taylor’s case was “indicted by a grand jury . . . on three counts of wanton endangerment because shots he fired entered a neighboring apartment.” Nicholas Bogel-Burroughs, *Louisville Officer Who Shot Breonna Taylor Will Be Fired*, N.Y. TIMES (Dec. 29, 2020), <https://www.nytimes.com/2020/12/29/us/louisville-officer-fired-jaynes-breonna-taylor.html> [<https://perma.cc/FN4L-CTQA>].

18. *See, e.g.,* Mariame Kaba, Opinion, *Prosecuting Cops Does Not Equal Justice*, TRUTHOUT (May 6, 2015), <https://truthout.org/articles/prosecuting-cops-does-not-equal-justice> [<https://perma.cc/2WM7-5RSK>].

19. *See infra* Part I.A.

20. *See infra* Parts I.B–C.

This Article reimagines the place of courts in the contemporary struggle for the abolition of racialized punitive systems. Drawing on legal scholarship and empirical social scientific research, Part I details how courts contribute to the present crisis of mass criminalization through legal doctrine, practices of racialized social control and violence, and economic exploitation. Part II describes the contemporary abolition movement, briefly laying out its genesis and three guiding principles that we see as emergent from the movement to abolish police and prisons: (1) power shifting, (2) defunding and reinvesting, and (3) transformation. Part III explores how these principles could operate in relation to the courts, drawing on analysis of existing grassroots efforts as well as new possibilities. Ultimately, this Article underscores the necessity of abolishing criminal courts as sites of coercion, violence, and exploitation and replacing them with other social institutions, such as community-based restorative justice and peacemaking programs, while investing in the robust provision of social, political, and economic resources in marginalized communities.

I.

CRIMINAL COURTS AS AN UNJUST SOCIAL INSTITUTION

Much research and activism has focused on the twin crises of policing and prisons, which lie on the front end and back end of the criminal legal system, respectively. Police in the United States fatally shoot about 1,000 people each year²¹ and kill even more through physical force or negligence that does not involve firearms.²² The victims of police violence are disproportionately Black, Indigenous, and Latinx.²³ Beyond killings, police officers physically and sexually assault countless more people, especially marginalized women of color.²⁴ And even beyond these extreme, though all too common, abuses, the

21. See Mark Berman, John Sullivan, Julie Tate & Jennifer Jenkins, *Protests Spread over Police Shootings. Police Promised Reforms. Every Year, They Still Shoot and Kill Nearly 1,000 People*, WASH. POST (June 8, 2020), https://www.washingtonpost.com/investigations/protests-spread-over-police-shootings-police-promised-reforms-every-year-they-still-shoot-nearly-1000-people/2020/06/08/5c204f0c-a67c-11ea-b473-04905b1af82b_story.html [https://perma.cc/2CDS-2KZJ].

22. In 2016, the Guardian recorded 1,093 people killed by the police while the Washington Post recorded 962 shot and killed by the police that same year. The Guardian dataset includes killings not by shooting; for example, their methodology would include George Floyd's murder from a knee held to his neck for over eight minutes or Eric Garner's killing by chokehold. *The Counted: People Killed in 2016*, GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> [https://perma.cc/83K2-YXGK]; *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2016/> [https://perma.cc/5SV7-ZYDT].

23. Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCI. 16793, 16794 (2019).

24. See, e.g., ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* 109 (2017) (“The widespread, systemic, and almost routine nature of police sexual violence remains largely invisible to the public eye, though it chronically festers on the

most banal law enforcement activities are predatory, racialized, and targeted toward marginalized communities, whether one considers traffic stops,²⁵ the execution of outstanding warrants,²⁶ civil asset forfeitures,²⁷ or who is funneled into jail.²⁸ Meanwhile, on the other end of the criminal legal process, the prison system similarly reveals itself as a system of racial control. The sheer number of people incarcerated over the past several decades constitutes a crisis of mass incarceration.²⁹ At the peak of mass incarceration in 2008, about 2.3 million people were incarcerated in jails, prisons, and immigrant detention centers³⁰—a

streets and in alleys, squad cars, and police lockups. A 2015 investigative report by the *Buffalo News* cataloguing more than seven hundred cases concluded, ‘In the past decade, a law enforcement official was caught in a case of sexual abuse or misconduct at least every five days.’”); Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 41 (2017) (“Black women are murdered by the police. They are assaulted and injured by the police. They are arrested unlawfully by the police; and finally they are tried, convicted and incarcerated for defending themselves against nonpolice violence.”); Shannon Malone Gonzalez, *Black Girls and the Talk? Policing, Parenting, and the Politics of Protection*, SOC. PROBS. (Sept. 8, 2020), <https://doi.org/10.1093/socpro/spaa032> [<https://perma.cc/CM4S-EMT4>]. (“Black girls are more likely than boys to report having interactions with police at night; they are among the fastest growing incarcerated population, signifying increasing rates of criminal justice contact, and are increasingly subjected to sexual harassment and assault from police officers . . .”).

25. See JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO 73–74 (2019); Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 737–40 (2020); Rob Voigt, Nicholas P. Camp, Vinodkumar Prabhakaran, William L. Hamilton, Rebecca C. Hetey, Camilla M. Griffiths, David Jurgens, Dan Jurafsky & Jennifer L. Eberhardt, *Language from Police Body Camera Footage Shows Racial Disparities in Officer Respect*, 114 PROC. NAT’L ACAD. SCI. 6521, 6522–24 (2017).

26. See, e.g., Shytierra Gaston, *Producing Race Disparities: A Study of Drug Arrests Across Place and Race*, 57 CRIMINOLOGY 424, 439–40 (2019) (showing how police use outstanding warrants in ways that disproportionately impact Black people).

27. See Christopher Ingraham, *Law Enforcement Took More Stuff from People than Burglars Did Last Year*, WASH. POST (Nov. 23, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year> [<https://perma.cc/JUS9-C2LW>].

28. See DEP’T OF JUST., JAIL INMATES IN 2019, at 1 (2021) (“At midyear 2019, there were 224 persons incarcerated in jail per 100,000 U.S. residents. Blacks were incarcerated at a rate (600 per 100,000) more than three times the rate for whites (184 per 100,000).”).

29. See generally Lawrence D. Bobo & Victor Thompson, *Racialized Mass Incarceration: Poverty, Prejudice, and Punishment, in DOING RACE: 21 ESSAYS FOR THE 21ST CENTURY* 322 (Hazel Rose Markus & Paula M.L. Moya eds., 2010); MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (David Garland ed., 2001).

30. DANIELLE KAEBLE & LAUREN GLAZE, DEP’T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 2 tbl. 1 (2016).

sharp increase from the late 1970s.³¹ Like policing, mass incarceration targets young men of color, particularly those with low levels of education.³²

Between the police and the prison cell sits the criminal court. Criminal courts are the legal pathway from an arrest to a prison sentence, with myriad systems of control in between. They are sites where the cruel minutiae of the carceral system is perpetrated and legalized, allowing the millions of stops, searches, and arrests by police each year to become 2.3 million people imprisoned and separated from their families and more than 4.5 million people on probation and parole.³³ Thus, we cannot understand the present crisis without understanding how the criminal courts function to legitimate police while funneling people into carceral spaces and other systems of state violence and control.

In this Part I, we detail how criminal courts operate as an unjust social institution through their legitimation and use of police, jails, and prisons as well as through their own unique techniques of violence and mass criminalization. *Mass criminalization* speaks to the way the legal system as a whole entraps millions of Americans through coercive social control. The term may be useful as a unifying concept, and it illustrates why all the various points in the criminal legal process should be scrutinized in an abolitionist project.³⁴ Defined as the

31. In 1978, 131 of every 100,000 residents in the country were incarcerated in state or federal prisons, compared to 450 per 100,000 in 2016. *Corrections Statistical Analysis Tool (CSAT) - Prisoners*, BUREAU OF JUST. STAT., <http://www.bjs.gov/index.cfm?ty=nps> [<https://perma.cc/78L3-Q8DU>] (follow “Quick Tables” hyperlink; then select “1987–2019” under the “Imprisonment rates” subsection). These rates include only individuals sentenced to a year or more of incarceration.

32. In 2005, the White incarceration rate was 412 per 100,000 residents, which was far lower than the incarceration rates of Black people and Hispanic people. Their rates were 2,290 per 100,000 and 742 per 100,000, respectively. MARC MAUER & RYAN S. KING, *THE SENT’G PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 4* (2007). The likelihood of incarceration is highest among people of color with lower levels of education. For example, among Black men born in the 1970s, the cumulative risk of incarceration by their mid-thirties was 68 percent for high school dropouts, but only 6.6 percent for Black men with some college education. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, *DÆDALUS*, Summer 2010, at 8, 11 tbl. 1.

33. See KAEBLE & GLAZE, *supra* note 30, at 2 tbl. 1.

34. See Matthew Kevin Clair, *Privilege and Punishment: Unequal Experiences of Criminal Justice 10* (Apr. 2018) (Ph.D. dissertation, Harvard University), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:41128495> [<https://perma.cc/JT9X-CCCR>] (comparing the use of the term “mass criminalization” to the term “mass incarceration”); see also Deborah Small, *Cause for Trepidation: Libertarians’ Newfound Concern for Prison Reform*, *SALON* (Mar. 22, 2014) https://www.salon.com/2014/03/22/cause_for_trepidation_libertarians_newfound_concern_for_prison_reform [<https://perma.cc/GH5A-4PSQ>] (same). The use of the modifier “mass” in the term “mass criminalization” indicates a normative critique of the unjust power dynamics that are a part of the massive scale of criminalization. See Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 *MICH. L. REV.* 259, 263 (2018) (“The mass frame, on the other hand, focuses on the criminal system as a sociocultural phenomenon. The issue is not a miscalibration; rather, it is that criminal law is doing ill by marginalizing populations and exacerbating troubling power dynamics and distributional inequities.”). In addition, the term “mass criminalization” speaks to the expansion of punishment beyond the criminal legal system, as techniques of punitive social control have infused into other institutions supposedly unrelated to the criminal legal system, such as schools and social welfare agencies. See Subini Ancy Annamma, Yolanda Anyon, Nicole M. Joseph, Jordan Farrar, Eldridge Greer, Barbara

historically unprecedented “use of an array of punitive legal techniques and institutions,”³⁵ mass criminalization includes the court-mandated tools of probation conditions, fines, and fees, which enable social control and exploitation of marginalized populations.

Part I.A details how legal doctrine and court practices contribute to mass criminalization by legitimating police through judicial deference to police searches and testimony and by creating barriers to accountability through judicial and prosecutorial practices. Courts are therefore complicit not only in granting police largely unchecked authority, but also in actively protecting and legitimizing policing as an institution. Parts I.B and I.C draw on social scientific research, historical analysis, and legal scholarship to show how the courts—through the laws, norms, and actions of courtroom workgroups—create their own abusive conditions and actively perpetrate unique forms of state violence. Part I.B describes how criminal courts control marginalized groups and enact violence through normalized legal acts. Part I.C shows how criminal courts financially exploit marginalized communities through cash bail, “user-pay” schemes, fines, and fees. In sum, criminal courts operate as a social institution that picks up the mantle to worsen racial and class-based injustices in American society.

A. Deference to Police

Judges defer to police accounts and actions through legal doctrine and court practices. Legal doctrine, or judge-made law that creates a framework for future decision-making,³⁶ overwhelmingly favors not just police but also law enforcement³⁷ actors more generally, like prosecutors and correctional officers, over people who are criminalized. Here, we focus on how courts defer to police

Downing & John Simmons, *Black Girls and School Discipline: The Complexities of Being Overrepresented and Understudied*, 54 URB. EDUC. 211, 213 (2019) (addressing racism and criminalization in schools); Francis A. Pearman II, F. Chris Curran, Benjamin Fisher & Joseph Gardella, *Are Achievement Gaps Related to Discipline Gaps? Evidence from National Data*, AERA OPEN (Oct. 15, 2019), <https://journals.sagepub.com/doi/pdf/10.1177/2332858419875440> [<https://perma.cc/K6DS-A4BN>] (same). Alec Karakatsanis has used the term “punishment bureaucracy” to describe the way the criminal legal system functions: “If the function of the modern punishment system is to preserve racial and economic hierarchy through brutality and control, then its bureaucracy is performing well.” ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM 16 (2019).

35. MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT 10 (2020).

36. Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV. 517 (2006).

37. The term law enforcement could be placed in scare quotes because when White college students are not policed for their drug use, but poor Black people are sentenced to life in prison for it, it is not the law that is being enforced, but rather existing race, class, and other social hierarchies. See, for example, A. RAFIK MOHAMED & ERIK D. FRITSVOLD, DORM ROOM DEALERS: DRUGS AND THE PRIVILEGES OF RACE AND CLASS (2010), for a discussion of the non-policing of White college student drug dealers.

in ways that allow for immeasurable police-perpetrated harm in marginalized communities and prop up mass criminalization.

For example, courts have crafted Fourth Amendment jurisprudence to defer to police interpretations of reasonableness and acceptable conduct. The Fourth Amendment ostensibly protects people from unreasonable searches and seizures as well as from the use of evidence obtained through illegal search and seizure practices.³⁸ Yet, the Supreme Court has granted police broad authority and discretion in its interpretation of what counts as a reasonable search. In the seminal case *Terry v. Ohio*, the Court approved the controversial and racially discriminatory practice of “stop and frisk” and affirmed police authority to frisk two Black men³⁹ because a police officer said he thought they were planning to shoplift.⁴⁰ Even though the officer did not have probable cause to arrest Terry and his companion, the Court upheld the search of the two men as “necessarily swift action predicated upon the on-the-spot observations of the officer on the beat.”⁴¹ In other words, the Court determined what was “reasonable” by deferring to the officer’s account and not, for instance, the perspective of the people subject to the search or bystanders. This deference greatly expanded police power to intervene in individuals’ lives and precluded analysis of the racial biases that are inevitably imbued in police judgments around suspicion both at the individual and department level; this lack of analysis can result in the criminalization of entire classes of residents.⁴²

Devon Carbado argued that Fourth Amendment jurisprudence de facto legalized racial profiling.⁴³ Courts mostly develop Fourth Amendment doctrine through individual challenges of searches and not through class actions. In these cases, courts virtually never consider whether a person was racially profiled, limiting analysis to the isolated search and deferring to police accounts. This leaves one of the most invidious aspects of policing beyond legal scrutiny and

38. See *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (holding that evidence obtained in violation of the Fourth Amendment is inadmissible in state court).

39. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). Notably, no opinion written in *Terry*—including the majority, dissent, and concurring opinions—mentioned that Terry and his companion were Black. This fact was included on the first substantive page of the petitioner’s brief, and it was centered in the amicus brief filed by the NAACP Legal Defense and Educational Fund. See Brief for Petitioner at 4, *Terry*, 392 U.S. 1 (No. 67), 1967 WL 93600 (“After observing these two colored males . . .”); Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae at 1–2, *Terry*, 392 U.S. 1 (No. 67), 1967 WL 113672 (introducing brief with two quotes about racial profiling). The Court’s whitewashing of the central issue in the case set the stage for decades of disproportionate harm and trauma to millions of Black people through stop and frisk programs.

40. *Terry*, 392 U.S. at 5–6.

41. *Id.* at 20.

42. Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159 (2015).

43. Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017).

outside doctrinal development.⁴⁴ In the decades following *Terry*, police departments across the country used “stop and frisk” practices to harass and assault mostly Black and brown residents. The New York City Police Department (NYPD) is a notorious offender. In 2011 alone, the NYPD made close to 700,000 stops,⁴⁵ which included stopping children: “[t]hrough they account for only 4.7 percent of the city’s population, [B]lack and Latino males between the ages of 14 and 24 accounted for 41.6 percent of stops in 2011.”⁴⁶ As this example shows, the consequence of Fourth Amendment jurisprudence is not just that these police actions evade legal scrutiny retrospectively. Rather, the jurisprudence shapes police behavior, creating the very conditions for police violence towards Black people.⁴⁷

This doctrinal deference to police is reinforced through everyday court practices. Anna Lvovsky described a “judicial presumption of police expertise”: a presumption that police officers have greater insight into crime and are therefore reliable authorities to whom judges should generally defer as expert witnesses. This presumption includes officers’ evaluations of probable cause and their criminological knowledge about how vague statutes, such as loitering laws, should be interpreted and enforced on the ground.⁴⁸ What the average police officer may understand as reasonable could stand in sharp contrast to what the average defendant, or the average resident, considers reasonable.⁴⁹ This is especially true given the pressure to make arrest and ticketing quotas, which likely incentivizes officers to be liberal in their searching practices,⁵⁰ and the widely documented racial bias imbued in almost all aspects of policing. In routine cases in trial courts, judges defer to officers’ sworn testimony, taking

44. *See id.* at 132–49 (presenting a series of hypotheticals showing how Fourth Amendment jurisprudence legalizes racial profiling).

45. N.Y.C.L. UNION, STOP-AND-FRISK 2011 3 (2012), https://www.nyclu.org/sites/default/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf [<https://perma.cc/H8MZ-MA4A>].

46. New York City’s stop and frisk policy was found unconstitutional in 2013. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013). After this decision, public pressure, and an administration change, the number of stops decreased significantly—by 98 percent—but still numbered in the tens of thousands each year, continuing in every precinct and with similar racial disparities. N.Y.C.L. UNION, STOP-AND-FRISK IN THE DE BLASIO ERA 4 (2019), https://www.nyclu.org/sites/default/files/field_documents/20190314_nyclu_stopfrisk_singles.pdf [<https://perma.cc/M2CL-D2H4>].

47. Carbadó, *supra* note 43, at 131–32, 138–39, 158, 163–64 (describing the evolution of Fourth Amendment jurisprudence as a way of facilitating police violence against Black people).

48. Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2036–38 (2017).

49. *See* Richard H. McAdams, Dhammika Dharmapala & Nuno Garoupa, *The Law of Police*, 82 U. CHI. L. REV. 135, 135–58 (2015) (discussing the likely “lower threshold of doubt” that police, compared to the average person, have in relation to probable cause and reasonable suspicion and the need to have greater scrutiny for police interpretations of reasonableness).

50. Police officers admit quotas exist in their departments, even though they are against the law. Joel Rose, *Despite Laws and Lawsuits, Quota-Based Policing Lingers*, NPR (Apr. 4, 2015), <https://www.npr.org/2015/04/04/395061810/despite-laws-and-lawsuits-quota-based-policing-lingers> [<https://perma.cc/8RRP-A7TR>].

officers at their word despite the well-known practice of officers “testilying.”⁵¹ Courtroom deference also extends to evidence gathered by police. Courts are extremely deferential in admitting scientific evidence from prosecutors, derived from police investigations,⁵² despite serious questions about the scientific validity of some collection methods and thus the reliability of such evidence, including bite marks⁵³ and fingerprints.⁵⁴ Defense attorneys, given their oft-scant resources and the power of police in criminal courtrooms, frequently do not pursue suppression hearings.⁵⁵ And when they do, they rarely prevail.⁵⁶

Courts extend this deference beyond the day-to-day activities of police to situations in which police officers are accused of serious misconduct. When people harmed by police abuse turn to courts for accountability, they rarely find their desired outcomes because police are shielded by legal doctrine and other protective scaffolding. Prosecutors and judges defer to officers’ accounts of fearing for their lives, rarely challenging an officer’s self-defense claim. Doing so effectively shields police from criminal prosecution. Recent examples of this include high-profile police killings where prosecutors argue that officers’ accounts constitute a “reasonable” use of force in the face of officers’ claimed fear for safety.⁵⁷ Beyond doctrine, prosecutors find themselves in a co-dependent institutional relationship with police, whereby they share “norms, resources, and goals.”⁵⁸ Thus, prosecutors are “unwilling to jeopardize the flow of criminal cases and helpful testimony that police officers provide, proactively deploy[ing] their legal discretion and extralegal power to cover for police” through charge manipulation, withholding evidence, and political lobbying.⁵⁹ This co-dependence makes it professionally costly for prosecutors to bring charges

51. Joseph Goldstein, *Testilying by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018), <https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html> [<https://perma.cc/TUAW-N2UY>]; see Eve L. Ewing, *Blue Bloods: America’s Brotherhood of Police Officers*, VANITY FAIR, (Aug. 25, 2020), <https://www.vanityfair.com/culture/2020/08/americas-brotherhood-of-police-officers> [<https://perma.cc/T8JV-G4VK>] (describing ways that police protect themselves above and beyond their duty and obligation to serve and protect the public).

52. NAT’L ACAD. OF SCI., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 11 (2009) (“[T]rial judges rarely exclude or restrict expert testimony offered by prosecutors . . .”). The report specifically disavowed that judges are able to be effective gatekeepers for junk science, putting the onus on the forensic scientific community to improve itself. *Id.* at 110.

53. *Id.* at 176 (“No scientific studies support [the assessment that] bite marks can demonstrate sufficient detail for positive identification.”).

54. *Id.* at 136–45.

55. CLAIR, *supra* note 35, at 190.

56. Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 435 (2012) (“Because in suppression hearings virtually everyone is guilty of possessing contraband—or at least of possessing incriminating evidence—judges will likely come to view police searches as accurate and likely to yield evidence.”).

57. Rick Rojas & Richard Fausset, *Police Killings Prompt Reassessment of Laws Allowing Deadly Force*, N.Y. TIMES (June 14, 2020), <https://www.nytimes.com/2020/06/14/us/rayshard-brooks-garrett-rolfe-atlanta.html> [<https://perma.cc/U2YF-5WPL>].

58. Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 900–01 (2020); see David Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451 (2018).

59. Trivedi & Gonzalez Van Cleve, *supra* note 58, at 901.

against police. And even when they do, judges often rely on the same reasonableness standard to acquit officers—a standard that, again, defers to police officers’ subjective beliefs about fear, danger, and justified use of force.⁶⁰ Meanwhile, in civil cases, police are rarely held accountable for their actions because of “qualified immunity,” a court-created legal protection for government officials that shields most officers from civil liability for their violent acts.⁶¹ Attorney fees in civil rights cases are typically paid only in a winning case, through fee shifting,⁶² making it difficult to even bring a case with such a prohibitive legal standard and narrowing the field of cases not only for possible remuneration, but also for legal interpretation. And even if a case is filed and a court finds that an officer engaged in wrongdoing, insurers and municipalities are more likely to compensate harmed parties with little effect on police budgets.⁶³

The “deference” we have described should not be understood as passive. In fact, courts affirm police activities through legal action. Courts have been shown to sign home search warrants without scrutinizing the probable cause affidavits submitted in support;⁶⁴ they create legal doctrine to protect police officers and

60. See, e.g., Jennifer Carlson, *Police Warriors and Police Guardians: Race, Masculinity, and the Construction of Gun Violence*, 67 SOC. PROBS. 399 (2020) (discussing the centrality of danger and fear in the everyday work of police); Michael Sierra-Arévalo, *American Policing and the Danger Imperative*, 55 LAW & SOC’Y REV. 70 (2021) (same); Seth Stoughton, *Law Enforcement’s “Warrior” Problem*, 128 HARV. L. REV. F. 225 (2015) (same); see also Rick Trinkner, Erin M. Kerrison & Phillip Atiba Goff, *The Force of Fear: Police Stereotype Threat, Self-Legitimacy, and Support for Excessive Force*, 43 LAW & HUM. BEHAV. 421 (2019) (demonstrating how police officers who fear appearing racist show greater support for abusive policing techniques and less support for restrictions on their use of force).

61. For example, the doctrine has been used to shield from liability police officers who tased a seven-months-pregnant woman in three different parts of her body, in front of her child, after she was pulled over for a traffic ticket; police officers who shot seventeen times and killed a mentally impaired person riding a bike and carrying a toy gun, who did not match the description of the suspect being sought; and government officials who conspired to hold people in solitary confinement based on their race, religion, and national origin. Amir H. Ali & Emily Clark, *Qualified Immunity: Explained*, APPEAL (June 19, 2019), <https://theappeal.org/qualified-immunity-explained> [<https://perma.cc/EM9J-XM8T>]. Qualified immunity was also used recently to shield from liability officers who shot a person with an electrified taser after the person had doused himself in gasoline and an officer on the scene said, “If we tase him, he is going to light on fire.” The person died from the fire ignited by the taser. *Ramirez v. Guadarrama*, 3 F.4th 129, 132 (5th Cir. 2021); see William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 46 (2018) (“The doctrine of qualified immunity prevents government agents from being held personally liable for constitutional violations unless the violation was of ‘clearly established law.’”).

62. See Thomas A. Eaton & Michael L. Wells, *Attorney’s Fees, Nominal Damages, and Section 1983 Litigation*, 24 WM. & MARY BILL RTS. J. 829, 836 (2016).

63. E.g., John Rappaport, *An Insurance-Based Typology of Police Misconduct*, 2016 U. CHI. LEGAL F. 369 (explaining liability insurance covering a range of police misconduct claims); Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016) (studying the source of funds used by governments to satisfy suits brought against law enforcement).

64. See Balko, *supra* note 7.

other members of the executive branch, such as qualified immunity;⁶⁵ and they do not carefully consider the limitations of forensic evidence against defendants.⁶⁶ Each of these examples is an opportunity for courts to act as a check on executive power; instead, courts become arms of the executive, using their coequal status to actively concentrate governmental power, legitimizing state violence against marginalized communities.

B. *Violence and Social Control*

Beyond legitimizing police, criminal courts themselves function as institutions of punitive social control, both in their everyday courtroom practices and in “the violence of legal acts.”⁶⁷ In his seminal article *Violence and the Word*, Robert Cover described how the act of legal interpretation and decision-making is itself a form of violence that generates “credible threats and actual deeds.”⁶⁸ He wrote:

Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence.⁶⁹

Moreover, daily courtroom acts that have become normalized to many court professionals are forms of routinized state violence. For instance, the routine of being brought into court from jail often involves handcuffing, shackling,⁷⁰ and wearing jumpsuits that mark a person as a criminal rather than as a person who should be presumed innocent by law, even though the majority of people brought into court from jail have not been convicted of a crime.⁷¹ Armed court officers, ready to subdue defendants, watch and surround them. Defendants are forced to sit facing forward and to abide by formalities with a judge and attorneys who are deciding whether to cage them and separate them

65. See Ali & Clark, *supra* note 61.

66. See NAT'L ACAD. OF SCI., *supra* note 52.

67. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (“Legal interpretation takes place in a field of pain and death.”).

68. *Id.* at 1610.

69. *Id.* at 1601.

70. Even children are shackled in courtrooms. Alec Karakatsanis (@equalityAlec), TWITTER (Mar. 9, 2021), <https://twitter.com/equalityAlec/status/1369327224256663564> [<https://perma.cc/4SSA-VDN5>]. (“A few years ago, I saw cops bring a 9-year-old into court in metal waist, hand, and foot restraints. Then another child with an intellectual disability. And another. I was told no one had objected to child-shackling in DC in years. It was normal, and it still is across the U.S.”).

71. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html#slideshows/slideshow1/2> [<https://perma.cc/4DAJ-KR7Y>] (“74% of people held by jails are not convicted of any crime.”).

from their families; they risk further punishment when they do not abide by court norms.⁷² Judges address people charged with crimes in near soliloquy, reading off admonishments or choosing bail amounts based on a chart and rarely providing a defendant with a meaningful opportunity to speak. Family members are required to sit silently as their loved ones' fates are decided.⁷³ The coercion inherent in these routine acts forces traumatic, Kafkaesque choices on people charged with crimes. For instance, Amanda Woog, in her role as Executive Director of the Texas Fair Defense Project, recently witnessed a person in Travis County, Texas, break down crying as the judge asked him why he would choose jail time over a probation offer in a criminal plea. The person responded that the costs associated with probation would have made him unable to afford his wife's medical treatment for cancer.

White supremacy is foundational to criminal courts' violence and social control function. After the Civil War, Black people were routinely denied due process rights, especially in Southern courtrooms, where they were tortured to compel self-incriminating testimony, sentenced to death *en masse* on frivolous charges, and excluded from serving on juries.⁷⁴ Although the Supreme Court eventually intervened in extreme cases of Jim Crow injustices, the Court's decisions had only a modest, and in some ways legitimizing, impact—invalidating the most egregious instances of racism but authorizing more routine practices that produced racially disparate outcomes and further entrenched existing racial hierarchies.⁷⁵ In the 1940s, federal efforts to standardize criminal rules and procedures further entrenched racist procedural norms through a cloak of race-neutrality. Ion Meyn showed how reformers, many of whom were

72. For example, a magistrate judge in Harris County was recorded on video increasing a person's bond by \$1,000 when she responded "yeah" instead of "yes." Meagan Flynn, *Harris County Judge Says Arrests of Poor People Good for Job Security*, HOUS. PRESS (Nov. 16, 2016), <https://www.houstonpress.com/news/harris-county-judge-says-arrests-of-poor-people-good-for-job-security-8950616> [<https://perma.cc/S3ZC-TM35>].

73. After the charges were dismissed against the officer who killed his sister, Rekia Boyd, Martínez Sutton shouted in court, "You want me to be quiet? This motherfucker killed my sister!" and was "dragged out of the proceedings by deputies." Mariame Kaba, *Four Years Since a Chicago Police Officer Killed Rekia Boyd, Justice Still Hasn't Been Served*, IN THESE TIMES (Mar. 21, 2016), <https://inthesetimes.com/article/four-years-since-the-shooting-of-reakia-boyd> [<https://perma.cc/RVF7-K3C2>].

74. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 28–59 (2012); W. E. B. DU BOIS, *THE PHILADELPHIA NEGRO: A SOCIAL STUDY* (Univ. Pa. Press 1996) (1899) (studying and reporting the problems surrounding Black integration into American society in the 1890s); NEIL R. McMILLEN, *DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW* (1989); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

75. Klarman, *supra* note 74; see Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161 (2019) (arguing that race and racism were central to the expansion of indigent defense systems); SARA MAYEUX, *FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA* (2020) (arguing that the expansion of the right to counsel in the mid- and late-twentieth century was largely symbolic and broadly functioned to legitimate material inequalities under the criminal law).

explicitly racist, adopted separate rules for criminal courts and civil courts. In civil courts, where litigants were disproportionately White, reformers expanded the ability to participate in the legal process, discover information, and interrogate witnesses. In criminal courts, where defendants were disproportionately Black and poor, reformers implemented rules that expanded state power and diminished defendants' rights, thereby reinforcing "the racial ordering of the period within the criminal law arena."⁷⁶

In the middle of the twentieth century, social scientists began collecting data on state-level criminal courts, offering systematic evidence of routine, and often unwritten, court practices.⁷⁷ Today, social scientists have shown how twenty-first century criminal court practices operate to control poor people and marginalized racial groups, all the while maintaining a veneer of racial neutrality.⁷⁸ In *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing*, Issa Kohler-Hausmann documented how legal officials in New York City misdemeanor courts used various techniques to mark, test, and monitor the defendants before them, such as keeping cases open to see if a defendant would comply with court mandates to return to monthly hearings or requiring various performances with drug programs to demonstrate compliance.⁷⁹ These practices constitute a new, managerial model of control, whereby officials seek to determine not whether a defendant is innocent or guilty but whether the defendant is "a manageable person."⁸⁰

These techniques emerged from a particularly racialized phenomenon: the rise of Broken Windows policing in New York City in the 1990s. Under police commissioner William Bratton, police criminalized mostly poor people of color by stopping, citing, and arresting them for "quality-of-life" offenses, such as noise complaints, double parking, and panhandling. Today, Broken Windows policing continues to be an "institutionalized feature of New York City's law enforcement"⁸¹ and has spilled into the courts, where lawyers and judges must manage an influx of low-level cases the police have left at their doorstep. As

76. Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 ARIZ. L. REV. 1, 4 (2021); see Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697, 706–07 (2017).

77. See, e.g., ABRAHAM S. BLUMBERG, CRIMINAL JUSTICE (1967); EISENSTEIN & JACOB, *supra* note 12; MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

78. See MONA LYNCH, HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT (2016) (explaining how federal drug laws shifted the use of power in our legal system with disproportionate implications for people of color and the poor); see also AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT (2009); KARAKATSANIS, *supra* note 34.

79. ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 79–82 (2018).

80. *Id.* at 72.

81. *Id.* at 26.

with policing, the misdemeanor courts' techniques of social control fall disproportionately on communities of color.⁸²

Other research has shown how routine court practices apply control and violence differentially along race and class lines,⁸³ complementing statistical analyses showing that a meaningful proportion of such disparities emerge during court processing rather than simply as a result of differential sorting into the courts.⁸⁴ In *Crook County: Racism and Injustice in America's Largest Criminal Court*, Nicole Gonzalez Van Cleve showed how judges, prosecutors, and defense attorneys in the Cook County, Illinois, court system code "racial difference as moral difference."⁸⁵ Racialized moral labels become ingrained into court routines, such that defendants of color—stereotyped as "degenerate, lazy, and undeserving"—are not afforded due process protections.⁸⁶ In *Privilege and Punishment: How Race and Class Matter in Criminal Court*, Matthew Clair documented how the attorney-client relationship at once constitutes and reproduces racial and class-based injustices in the Boston courts.⁸⁷ Working-class defendants of color and poor defendants are rarely able to establish trusting relationships with their lawyers, making these defendants more susceptible to coercion, shaming, and silencing from judges and defense attorneys and decreasing their likelihood of receiving opportunities for rehabilitation and future legal assistance. Because the quality of the attorney-client relationship is rooted in inequalities, such as racist police practices and the lack of resources afforded to court-appointed defense attorneys, the consequences of the relationship "can be understood as a covert, and often unintentional, form of racial and class discrimination" within courtrooms—a kind of discrimination

82. *Id.* at 267; see ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 149–70 (2018).

83. *E.g.*, Matthew Clair & Alix S. Winter, *How Judges Think About Racial Disparities: Situational Decision Making in the Criminal Justice System*, 54 CRIMINOLOGY 332 (2016); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999 (2013); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013).

84. *E.g.*, Eric P. Baumer, *Reassessing and Redirecting Research on Race and Sentencing*, 30 JUST. Q. 231, 235–37 (2013); Ojmarrh Mitchell, *A Meta-analysis of Race and Sentencing Research: Explaining the Inconsistencies*, 21 J. QUANTITATIVE CRIMINOLOGY 439, 462–64 (2005); Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIM. JUST. 427, 428 (2000).

85. NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* 4 (2016).

86. *Id.* at 65.

87. CLAIR, *supra* note 35; see Matthew Clair, *Being a Disadvantaged Criminal Defendant: Mistrust and Resistance in Attorney-Client Interactions*, 100 SOC. FORCES 194 (2021) (discussing the results of a study that documented how criminal defendants in the Boston area interacted with their attorneys).

that most legal authorities do not view as problematic.⁸⁸ Clair concluded that these unequal dynamics should be understood as an injustice, or an unfair set of social relations that could be remedied through institutional and societal change.

Court-ordered social control tools severely constrict defendants' lives outside of the court, with disproportionately harmful implications for poor people of color.⁸⁹ While awaiting trial, various restrictions on liberty can be attached to a defendant through their bail conditions. Pretrial incarceration, GPS monitoring, mandatory drug testing, and stay-away orders severely constrain the freedom of people charged with crimes despite their formal designation as being presumed innocent under the law.⁹⁰ If convicted, a person may face incarceration. If returned to the community, they may be forced to abide by terms of probation. Probation conditions can include requirements similar to bail conditions, with implications for widening the number of people under supervision whose likelihood of revocation is racially and socioeconomically disparate.⁹¹ Release on parole similarly triggers punishing restrictions on freedom. And once a person has served their time, various attendant consequences can impact their lives—from housing and employment discrimination to voter disenfranchisement and jury exclusion.⁹² Sarah Brayne documented how people who have had contact with the criminal legal system avoid other surveilling systems, including medical, financial, and educational institutions.⁹³ These consequences affect the lives of not only individuals who have had direct experiences with the criminal legal system, but also their families, friends, and neighbors, who may experience the spillover effects.⁹⁴

88. CLAIR, *supra* note 35, at 141; see Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1494, 1535–38 (2021).

89. See generally MAYA SCHENWAR & VICTORIA LAW, *PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS* (2020) (detailing state tools of social control that are branded as alternatives to incarceration).

90. Alix S. Winter & Matthew Clair, *Between Punishment and Welfare: Liminal Guilt and Social Control in the Bail Process 3* (May 2021) (unpublished manuscript) (on file with author).

91. Michelle S. Phelps, *Mass Probation and Inequality: Race, Class, and Gender Disparities in Supervision and Revocation*, in *HANDBOOK ON PUNISHMENT DECISIONS: LOCATIONS OF DISPARITY* 43, 49 (Jeffery T. Ulmer & Mindy S. Bradley eds., 2017); Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW POL'Y 51 (2013).

92. E.g., David S. Kirk & Sara Wakefield, *Collateral Consequences of Punishment: A Critical Review and Path Forward*, 1 ANN. REV. CRIMINOLOGY 171, 175–76 (2018); Brian M. Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139, 1147–58 (2015).

93. Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AM. SOCIO. REV. 367, 385 (2014).

94. See generally John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121 (1999); Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 CRIMINOLOGY 441 (1998) (examining the unintended consequences of incarceration).

Such so-called collateral consequences and their spillover effects disproportionately harm Black, Latinx, and Indigenous people.⁹⁵

C. Predation and Profit

In addition to controlling marginalized groups, criminal courts also impose sanctions that exploit and profit from these groups.⁹⁶ The for-profit bail industry and legal financial obligations (such as court fines and fees) are state-sanctioned forms of predatory extraction that uniquely target poor and other marginalized communities. Social scientific research has confirmed various ways the criminal courts profit from poor communities of color in unconstitutional and unjust ways.

Criminal courts impose legal financial obligations (LFOs) on defendants that provide revenue to local and state governments and profits to businesses: “fines and fees can be seen not just as burdens imposed as sanctions but as elements of a variegated palette of extractive relations and practices associated with the criminal justice system . . . convert[ing] the needs, vulnerabilities, and aspirations of subjugated populations into revenue opportunities for state and market actors.”⁹⁷ LFOs include “fines, fees, surcharges, [and] restitution” that courts directly impose as punishment for an offense, such as a traffic violation; restoration of an alleged harm or violation, such as payment to victims; or requested payment for services provided by the court, such as fees for court-appointed legal representation.⁹⁸ LFOs disproportionately burden communities of color, given racialized police practices such as traffic stops and arrests,⁹⁹ and court practices that uniquely punish the poor, such as late fees, payment plan

95. Asad L. Asad & Matthew Clair, *Racialized Legal Status as a Social Determinant of Health*, 199 SOC. SCI. & MED. 19, 21 (2018).

96. See generally Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1099 (2015) (describing how “lower criminal courts are being reconceptualized and repurposed as revenue sources”); Armando Lara-Millan, *Theorizing Financial Extraction: The Curious Case of Telephone Profits in the Los Angeles County Jails*, 23 PUNISHMENT & SOC’Y 107 (2021) (addressing exploitation and criminal justice contact); Joshua Page, Victoria Piehowski & Joe Soss, *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation*, 5 RSF: RUSSELL SAGE FOUND. J. SOC. SCIS. 150 (2019) (same); Sandra Susan Smith & Jonathan Simon, *Exclusion and Extraction: Criminal Justice Contact and the Reallocation of Labor*, 6 RSF: RUSSELL SAGE FOUND. J. SOC. SCIS. 1 (2020) (same).

97. Page et al., *supra* note 96, at 152; see Lara-Millan, *supra* note 96, at 111 (contrasting social control functions with exploitation and profiteering functions).

98. Karin D. Martin, Bryan L. Sykes, Sarah Shannon, Frank Edwards & Alexes Harris, *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 ANN. REV. CRIMINOLOGY 471, 471 (2018).

99. See, e.g., CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* (2014); Allison P. Harris, Elliott Ash & Jeffrey Fagan, *Fiscal Pressures and Discriminatory Policing: Evidence from Traffic Stops in Missouri*, 5 J. RACE, ETHNICITY & POL. 450, 461 (2020); Brenden Beck & Adam Goldstein, *Governing Through Police? Housing Market Reliance, Welfare Retrenchment, and Police Budgeting in an Era of Declining Crime*, 96 SOC. FORCES 1183 (2018).

fees, and warrants issued for nonpayment.¹⁰⁰ In theory, low-income people have constitutional protections to keep courts from enforcing obligations that a person cannot afford. In reality, judges rarely waive LFO debt, and it is common practice for judges to issue warrants and keep people in jail because they are unable to pay.¹⁰¹

When a person cannot pay their LFOs, courts use the punitive tools of the state, such as warrants and incarceration, to coerce payment or punish people for nonpayment, routinely violating the constitutional rights of poor people charged with crimes.¹⁰² Despite the Supreme Court having long held that “the State . . . may not . . . imprison a person solely because he lacked the resources to pay [a fine or restitution],”¹⁰³ courts across the country jail people every day if they cannot pay a traffic ticket or other court fine or fee,¹⁰⁴ forcing families to skip rent or meals to come up with payment or have their loved one languish in jail. A person who cannot pay might find an attorney to represent them free of cost, but this is rare. Most courts do not provide lawyers to people charged with “fine-only” crimes even if the court jails the person for not paying.¹⁰⁵

100. TEX. APPLESEED & TEX. FAIR DEF. PROJECT, PAY OR STAY: THE HIGH COST OF JAILING TEXANS FOR FINES & FEES 4 (2017), https://www.texasappleseed.org/sites/default/files/PayorStay_Report_final_Feb2017.pdf [<https://perma.cc/SQL4-XXBN>].

101. *Id.* at 9; see MONEY AND PUNISHMENT, CIRCA 2020 (Anna VanCleave, Brian Highsmith, Judith Resnik, Jeff Selbin & Lisa Foster eds., 2020).

102. See KARAKATSANIS, *supra* note 34, at 15 (observing that constitutional violations of poor people’s rights in criminal courts “are simultaneously illegal and the norm”); see also Justin Murray, *Policing Procedural Errors in the Lower Criminal Courts*, 89 FORDHAM L. REV. 1411, 1412–13 (2021) (describing how lower courts allowed routine shackling of people charged with crimes, despite the requirement of individualized circumstances).

103. *Bearden v. Georgia*, 461 U.S. 660, 667–68 (1983).

104. U.S. COMM’N ON C.R., TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR 38–39 (2017), https://www.usccr.gov/files/pubs/docs/Statutory_Enforcement_Report2017.pdf [<https://perma.cc/F5P6-AQUZ>] (“A 2014 survey conducted by National Public Radio (NPR), Brennan Center, and the National Center for State Courts (NCSC) found that in Benton County, Washington, 25 percent of the people in jail for misdemeanors on a typical day were there for nonpayment of fines and court fees. In Rhode Island, 18 percent of all defendants jailed between 2005 and 2007 were incarcerated because of court debt; in 2005 and 2006, that amounted to twenty-four people per day.”).

105. In *Scott v. Illinois*, the Supreme Court held that a person is entitled to counsel in a criminal case where imprisonment is imposed as a sentence. 440 U.S. 367, 374 (1979). The Court’s focus on the statutorily authorized imposed sentence for determining right to counsel has largely meant that people charged with “fine-only” offenses are not appointed counsel, since imprisonment is not authorized as punishment for those offenses. See Lisa Foster, *Judicial Responsibility for Justice in Criminal Courts*, 46 HOSTRA L. REV. 21, 32 (2017) (“When courts are assessing fines and fees, and especially when they are attempting to enforce collection, counsel are almost entirely lacking.”). However, this legal lineage ignores the fact that even though incarceration is not authorized as punishment for these offenses under statute, courts still incarcerate people if they cannot pay the fine. “For example, in Texas, ‘15 percent of all convictions for fine-only offenses, where jail is not an [initial] option for punishment, were [satisfied] through jail, while only 3 percent were satisfied through community service options, and less than 1 percent were waived due to indigence.’” U.S. COMM’N ON C.R., *supra* note 104, at 39 (quoting David Slayton, Admin. Director, Tex. Off. of Ct. Admin., Written Statement for the U.S. Comm’n on Civil Rights 2 (Mar. 17, 2017)).

State and local governments, including court systems, have used LFOs to boost revenue. In the wake of the police killing of Michael Brown in 2014 in Ferguson, Missouri, and the subsequent protests and unrest, the Department of Justice (DOJ) investigated the city's courts and police. The DOJ investigation concluded that "Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs."¹⁰⁶ City officials explicitly asked police to increase ticket enforcement to make up for tax shortfalls. Moreover, the city's municipal court routinely issued arrest warrants for failures to pay fines related to minor offenses, such as traffic violations. A separate report by ArchCity Defenders found that in one year, the Ferguson municipal courts disposed of three warrants per household.¹⁰⁷ People were routinely jailed for failing to pay fines and fees. These practices overwhelmingly targeted Black residents. The DOJ reported:

African Americans are 68% less likely than others to have their cases dismissed by the court, and are more likely to have their cases last longer and result in more required court encounters. African Americans are at least 50% more likely to have their cases lead to an arrest warrant, and accounted for 92% of cases in which an arrest warrant was issued by the Ferguson Municipal Court in 2013.¹⁰⁸

The DOJ report therefore suggests that judges, prosecutors, and other legal actors in Ferguson had discretion to reduce the harms of fines and fees but did not wield that discretion equally. In New Orleans, fines and fees issued and enforced by courts in turn feed and prop up the courts, funding 99 percent of the traffic court budget.¹⁰⁹ These exploitative and punitive practices target these cities' Black residents.¹¹⁰ Moreover, they are hardly unique to these jurisdictions: in 2018, Texas courts issued 1.5 million warrants for unresolved Class C misdemeanors, mostly traffic tickets, and more than 500,000 people used jail time to resolve their tickets.¹¹¹

106. U.S. DEPT. OF JUST., C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/EZ9H-9CJ6].

107. THOMAS HARVEY, JOHN MCANNAR, MICHAEL-JOHN VOSS, MEGAN CONN, SEAN JANDA & SOPHIA KESKEY, ARCHCITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER 35 (2014), <https://www.archcitydefenders.org/wp-content/uploads/2019/03/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf> [https://perma.cc/KDN2-6EDC].

108. U.S. DEPT. OF JUST., *supra* note 106, at 5.

109. MATHILDE LAISNE, JON WOOL & CHRISTINA HENRICHSON, VERA INST. OF JUST., PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS 26 (2017), <https://www.vera.org/downloads/publications/past-due-costs-consequences-charging-for-justice-new-orleans.pdf> [https://perma.cc/4UDR-DDKT].

110. *Id.* at 18–22.

111. Jacob Rosenberg, *Texas Asked Judges to Stop Throwing People in Jail for Unpaid Parking Tickets. They Didn't Listen.*, MOTHER JONES (Apr. 11, 2019), <https://www.motherjones.com/crime-justice/2019/04/texas-asked-judges-to-stop-throwing-people-in-jail-for-unpaid-parking-tickets-they-didnt-listen> [https://perma.cc/SG4U-MRA5].

Reports from Ferguson, New Orleans, and Texas reveal how courts have chosen to collaborate with police to facilitate, rather than hinder or at least serve as an institutional check against, the extraction of wealth from communities of color. As evidenced by the DOJ Report, judges, prosecutors, and even court clerks have broad discretion to dismiss charges and to collect fines and fees. This discretion is wielded in racially disparate ways.

Courts' facilitation of extraction from poor people of color through fines and fees has a long, racially exploitative history. Following emancipation, Southern planters relied on the criminal surety system to exploit the labor of newly freed Black people and poor people. Through the criminal surety system, planters would pay arrested people's court fines under the condition that they would work off their debt as agricultural laborers.¹¹² This system benefitted both private employers and courts: "Surplus from these payments padded public coffers (as well as the pockets of court officials), and when workers' debt records were subsequently 'lost' or there was an allegation of breach, surety contracts were extended and workers became further indebted to local planters and merchants."¹¹³

Bail practices within courts, and the for-profit bail industry that depends on such practices, are another notable example of courts' extraction from poor and marginalized communities. Whether operating in jurisdictions using bail schedules or in jurisdictions using enumerated statutory factors to guide bail decisions, judges across the country carry significant discretion in setting bail, and routinely set bail amounts above what defendants can afford to pay.¹¹⁴ Scholars have described bail hearings as a "messy affair,"¹¹⁵ commonly lasting only a few minutes, in which bail is set without regard for what a person is able to afford. As a result, hundreds of thousands of people languish in local jails because they cannot pay their way out.¹¹⁶ Cash bail creates a three-tiered, wealth-based system. In Tier One, the wealthy pay the full bail amount for their freedom, which is held by the court and returned to them after making the required court appearances. In Tier Two, those who can gather money for a bail bondsman fee pay for their release. The fee, which is typically around 10 percent of the bail amount, is nonrefundable, and the bail bondsman keeps the fee as profit.¹¹⁷ In

112. Christopher Muller & Daniel Schrage, *The Political Economy of Incarceration in the Cotton South, 1910–1925*, at 13 (Inst. for Rsch. on Lab. & Emp., Working Paper No. 105-19, 2021).

113. Tamar R. Birkhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1606 (2015).

114. Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in 3 ACAD. FOR JUST., REFORMING CRIMINAL JUSTICE 21, 25–26 (Erik Luna ed., 2017).

115. *Id.* at 25.

116. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/MQU6-SVE2>].

117. Rauby & Kopf describe:

"Surety" options allow defendants to pay a portion of the bail bond amount as a nonrefundable fee to a bail bondsman or agency. The fee is typically 10%, although it can be more or less than that. Even if the defendant shows up for all of his court dates, he will not

Tier Three are those who cannot afford to pay the bondsman fee. They remain in jail simply because of their inability to access cash. With the median felony bail amount at \$10,000¹¹⁸ and close to half of Americans without access to \$400 in an emergency,¹¹⁹ the price judges charge for pretrial freedom is inaccessible to most. Even if a person does have access to the cash to pay a bondsman fee, it results in the extraction of enormous amounts of money from marginalized communities. People charged with crimes and their families across the country pay more than \$1 billion to the for-profit bail industry every year.¹²⁰

Finally, as noted in Part I.B, judges apply conditions of release beyond monetary bail amounts, such as requiring drug-testing, regular check-ins with court officers, or alcohol-monitoring devices, which typically involve additional fees, invasive surveillance, and intrusive supervision. Some jurisdictions use for-profit probation services that “allow probation companies to profit by extracting fees directly from probationers, and then fail to exercise the kind of oversight needed to protect probationers from abusive and extortionate practices.”¹²¹ Industries have begun to take advantage of this growing demand, with bail bondsmen and for-profit probation services maneuvering their businesses to profit off of people involved in the criminal legal system.¹²² Private information-management companies have also profited from the growth of court caseloads and the collection of criminal record data by charging courts for record management, charging employers and landlords for background checks, and charging system-impacted people seeking to clear their names by removing inaccurate records or records that were supposed to be sealed.¹²³

get the fee back.

BERNARDETTE RABUY & DANIEL KOPF, PRISON POL’Y INITIATIVE, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME 3 (2016), <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf> [<https://perma.cc/WSV6-ML2T>]. See generally CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM (2019).

118. Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX: FUTURE PERFECT (Oct. 17, 2018), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality> [<https://perma.cc/ZY56-864J>].

119. Neal Gabler, *The Secret Shame of Middle-Class Americans*, ATLANTIC (May 2016), <https://www.theatlantic.com/magazine/archive/2016/05/my-secret-shame/476415> [<https://perma.cc/MB6G-FBRS>].

120. JUST. POL’Y INST., THE HIGH PRICE OF BAIL, https://web.archive.org/web/20210909193539/http://www.justicepolicy.org/uploads/justicepolicy/documents/high_price_of_bail_-_final.pdf.

121. HUM. RTS. WATCH, PROFITING FROM PROBATION: AMERICA’S “OFFENDER-FUNDED” PROBATION INDUSTRY 1 (2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf [<https://perma.cc/7GGD-Q674>].

122. For example, bail bondsmen in Hays County, Texas, recently submitted a proposal to the County to run their “pretrial services” office. Roger Moore, Att’y, Bail Agents Consulting, Inc., Hays County Pre-Trial Supervision Proposal (on file with authors).

123. SARAH ESTHER LAGESON, DIGITAL PUNISHMENT: PRIVACY, STIGMA, AND THE HARMS OF DATA-DRIVEN CRIMINAL JUSTICE 67–91 (2020).

The infrastructures described in this Section, in which courts extract wealth from marginalized communities and punish them when they cannot pay, are largely court-created and entirely court-perpetrated.

II.

THE ABOLITION MOVEMENT: THREE GUIDING PRINCIPLES

Criminal courts are central to the crisis of mass criminalization, yet there has been far more analysis of police and prisons in abolitionist theorizing than there has been of criminal courts.¹²⁴ Meanwhile, court reformers over the last few decades have proposed various, and sometimes contradictory, reformist solutions to make the courts more equitable: mandatory sentencing guidelines, advisory sentencing guidelines, mandatory minimum sentences, greater resources to indigent defense systems, implicit bias training among judges and prosecutors, cash bail reform, drug and veterans courts. The list is long, but the results have been modest: criminal courts continue to control and exploit millions of people, suggesting that such problematic features are better understood as core functions.

In Part II, we briefly overview the current movement to abolish police and prisons, identifying three core principles we see in organizers' demands—principles that could guide legal scholars, social scientists, policymakers, advocates, and others who are seeking to engage with abolitionist theorizing and striving to reimagine the courts. We view this scholarly analysis as an exercise in “movement law,” whereby we “take seriously the epistemological universe of today’s left social movements, their imaginations, experiments, tactics, and strategies for legal and social change.”¹²⁵ In doing so, we identify three guiding principles as central to the police and prison abolitionist movement: (1) power shifting; (2) defunding and reinvesting; and (3) transformation.

Abolition constitutes a theory and a practice that strives toward a society where racialized punitive systems of legal control and exploitation are no longer a component of the way we deal with criminalized social harms and problems, such as substance use disorders, mental illness, theft, assault, and even murder. For decades, scholars and activists have articulated and organized around abolitionist principles, focusing mostly on either the police, prisons, or both as specific institutional components to be dismantled. In the 1960s, the Black Panther Party articulated abolitionist demands rooted in a broader critique of capitalism. Points seven and eight of Huey P. Newton and Bobby Seale’s Ten-

124. *But see* Matthew Clair, *Getting Judges on the Side of Abolition*, BOS. REV. (July 1, 2020), <http://bostonreview.net/law-justice/matthew-clair-getting-judges-side-abolition> [<https://perma.cc/982Z-LV64>] (exploring how getting judges to transform their trial court practices could be a non-reformist reform); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019) (discussing various forms of abolition, including how to interpret the Constitution with an abolitionist framework).

125. Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 825 (2021).

Point Program demanded “AN IMMEDIATE END TO POLICE BRUTALITY AND MURDER OF BLACK PEOPLE” and “FREEDOM FOR ALL BLACK MEN HELD IN FEDERAL, STATE, COUNTY AND CITY PRISONS AND JAILS.”¹²⁶ Halfway around the world, Thomas Mathiesen, a Norwegian sociologist and prison abolitionist in the 1960s, defined abolition as “political work geared toward what I call ‘abolition’ of a repressive social system or part of such a system.”¹²⁷ In 1998, in the United States, activists and scholars including Angela Y. Davis and Ruth Wilson Gilmore—many of whom went on to establish the organization Critical Resistance—met at a conference in Berkeley, California, to diagnose the problem of the “prison-industrial complex” and imagine alternatives.¹²⁸ For these thinkers, the critique of prisons and police in the U.S. centered on these two institutions’ historical ties to slavery and their continued perpetuation of race- and class-based oppression.¹²⁹

Abolition offers not just a critique but also a set of alternatives. The phrase “abolition democracy,” first articulated by W. E. B. Du Bois, is meant to indicate that abolition of a system of oppression, such as slavery, necessitates positive investments that incorporate those who have been oppressed.¹³⁰ Abolitionist politics strive to at once *contradict* the existing police and prison systems and be in *competition* with them. The competition requirement necessitates imagining concrete alternatives rather than offering modest tweaks to existing arrangements. Abolitionists “must work concretely, not with reforms of improvement as links in a long-range policy of abolition, but with *concrete, direct, and down-to-earth partial abolitions* as links in the long-range policy.”¹³¹ Thus, the work of abolition may require short-term or modest efforts that remove components of systems but maintain the goal of facilitating their eventual abolition and replacement by democratic and capacity-building institutions of care and robust social provision.¹³² Abolitionists often refer to “non-reformist

126. Huey Percy Newton, *War Against the Panthers: A Study of Repression in America* 143 (Jun. 1980) (Ph.D. dissertation, University of California, Santa Cruz) (ProQuest).

127. THOMAS MATHIESEN, *THE POLITICS OF ABOLITION* 9 (1974).

128. See DAVIS, *supra* note 11, at 7–8.

129. *Id.* at 22–39; see RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007); Roberts, *supra* note 124; Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261 (2007).

130. Du Bois writes:

[T]here arose in the United States a clear and definite program for the freedom and uplift of the Negro, and for the extension of the realization of democracy . . . The abolition of slavery meant not simply abolition of legal ownership of the slave; it meant the uplift of slaves and their eventual incorporation into the body civil, politic, and social, of the United States.

W. E. B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 168–70 (Transaction Publishers 2014) (1935); see ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* (2005).

131. MATHIESEN, *supra* note 127, at 28.

132. This framework is central to an abolitionist understanding of other systems of oppression and exploitation, including capitalism. See, e.g., Erik Olin Wright, *Transforming Capitalism Through Real Utopias*, 78 AM. SOCIO. REV. 1 (2013). Indeed, social scientists—sociologists in particular—have

reforms” as partial abolitions—reforms that reduce the capacity of police and prisons and refuse to contribute to their legitimacy even if they do not yet fully abolish these systems. Unlike standard reforms, which often expand the scope of policing and prisons and legitimate the assumed need for them in society to maintain safety, non-reformist reforms can seek to “reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates.”¹³³ The distinction between non-reformist reforms and standard reforms became clear in the organizing efforts following George Floyd’s murder. In early June of 2020, Campaign Zero, a campaign started in 2015 to reduce police violence, unveiled #8CantWait, which consisted of eight proposals that sought to “bring immediate change to police departments.”¹³⁴ The proposals, which include asking police departments to ban chokeholds and to train officers to de-escalate situations, were criticized by abolitionists as a set of standard reforms that already exist in many departments and mostly function to legitimate policing.¹³⁵ In response, a “geographically dispersed, loose formation of abolitionists”¹³⁶ authored a campaign called #8toAbolition that presented eight non-reformist reforms, such as defunding the police, which sought to “reduce the scale, scope, power, authority, and legitimacy of criminalizing institutions.”¹³⁷

Given the limits of liberal reform visions, the Black Lives Matter movement has taken up the mantle in articulating and building alternatives to police and prisons, as evidenced in today’s debates between reformism and abolition.¹³⁸ Since 2013, in the wake of the killing with impunity of Trayvon

articulated a need for radical investments in what Michelle Jackson refers to as “webs of high-quality institutions” in order to eradicate economic, educational, and other forms of inequality. See MICHELLE JACKSON, *MANIFESTO FOR A DREAM: INEQUALITY, CONSTRAINT, AND RADICAL REFORM* 21 (2021).

133. Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/ALZ2-A3BW>]; see Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575 (2019) (“Abolition seeks (as it performs) a radical reconfiguration of justice, subjectivity, and social formation that does not depend on the existence of either the carceral State . . . or carceral power . . .”).

134. Campaign Zero, #8CANTWAIT, <https://8cantwait.org/> [<https://perma.cc/HDW9-2HGA>]; Daniel Kreps, *Campaign Zero’s ‘8 Can’t Wait’ Project Aims to Curtail Police Violence*, ROLLING STONE (Jun 4, 2020) <https://www.rollingstone.com/culture/culture-news/campaign-zero-8-cant-wait-police-violence-1010013/> [<https://perma.cc/AZA9-7RDM>].

135. See Lilly Smith, *In the Fight for Police Reform and Abolition, Design Plays a Key Role*, FAST CO. (Jun. 10, 2020) <https://www.fastcompany.com/90514381/in-the-fight-for-police-reform-and-abolition-design-plays-a-crucial-role> [<https://perma.cc/AK46-TRQH>].

136. Authors, #8TOABOLITION, <https://www.8toabolition.com/authors> [<https://perma.cc/8SLU-QZ4W>].

137. *Abolition Can’t Wait*, #8TOABOLITION, <https://www.8toabolition.com/why> [<https://perma.cc/977N-L7KX>].

138. See Alex S. Vitale, Opinion, *The Answer to Police Violence Is Not ‘Reform.’ It’s Defunding. Here’s Why.*, GUARDIAN (May 31, 2020), <https://www.theguardian.com/commentisfree/2020/may/31/the-answer-to-police-violence-is-not-reform-its-defunding-heres-why> [<https://perma.cc/6V2V-FZUN>]; Leila Raven, Mon Mohapatra & Rachel Kuo, *8 to Abolition is Advocating to Abolish Police to Keep Us All Safe*, TEEN VOGUE (June 25,

Martin, the movement—diverse yet mostly collaborative in its visions and organizing strategies—has been at the forefront of demands for racial justice. In the early 2010s, demands to abolish police and prisons tended to be on the periphery of the movement, which centered standard reform strategies such as training police officers and banning private prisons. In 2020, however, as evidenced by #8toAbolition, abolitionist demands have become more central. Continued protests throughout 2020 and 2021 have renewed many movement activists’, lawyers’, and scholars’ commitments to the politics and possibilities of abolition.¹³⁹ Specifically, organizers have articulated alternatives and strategies that we view as guided by the principles of power shifting, defunding and reinvesting, and transformation.

A. Power Shifting

Power shifting is the underlying principle that the power to define and manage social harm should be administered through a democratic process that centers marginalized communities. As Jocelyn Simonson wrote, “the movement focus on governance and policymaking in police reform . . . surface[s] the specific role that policing plays in denying people in highly policed neighborhoods their democratic standing and collective political impact.”¹⁴⁰ Currently, political and corporate elites, not everyday people, overwhelmingly define what constitutes crime, which people should be criminalized, and how we should punish those deemed criminal.¹⁴¹ Corporations and privileged communities disproportionately benefit from, and invest in, the policing of major cities¹⁴² and the building of prisons.¹⁴³ With little input from their constituents

2020), <https://www.teenvogue.com/story/8-to-abolition-abolish-police-keep-us-safe-op-ed> [<https://perma.cc/4HB7-7MZE>].

139. See Amna A. Akbar, Opinion, *The Left Is Remaking the World*, N.Y. TIMES (July 11, 2020), <https://www.nytimes.com/2020/07/11/opinion/sunday/defund-police-cancel-rent.html> [<https://perma.cc/Z2VP-PUJL>]. Establishment Democrats’ reactionary response to the phrase “defund the police” in the run up to the 2020 presidential election reveals the centrality of such abolitionist discourse in the political atmosphere. See D. Watkins, *No, Obama, We Do Mean “Defund the Police”*: *It’s Not a Snappy Slogan, It’s a Demand for Justice*, SALON (Dec. 13, 2020), <https://www.salon.com/2020/12/13/no-obama-we-do-mean-defund-the-police-its-not-a-snappy-slogan-its-a-demand-for-justice> [<https://perma.cc/LC3V-Q6RS>].

140. Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 784 (2021).

141. See Alec Karakatsanis, *Why “Crime” Isn’t the Question and Police Aren’t the Answer*, CURRENT AFFS. (Aug. 10, 2020), <https://www.currentaffairs.org/2020/08/why-crime-isnt-the-question-and-police-arent-the-answer> [<https://perma.cc/42CR-WLTP>].

142. Corporations donate to police foundations and rely on private security forces, securing racial capitalism through the use of police forces. See Saritha Ramakrishna, *Giving Back to Themselves*, BAFFLER (June 22, 2020), <https://thebaffler.com/latest/giving-back-to-themselves-ramakrishna> [<https://perma.cc/HP99-WCC4>].

143. See DAVIS, *supra* note 11, at 88–89. See generally JOHN M. EASON, *BIG HOUSE ON THE PRAIRIE: RISE OF THE RURAL GHETTO AND PRISON PROLIFERATION* (2017) (showing that even though prison siting and building can stem the tide of economic losses in working-class and poor communities and towns of color, there are also economic and social drawbacks to prison siting in these very same communities); MEGAN MUMFORD, DIANE WHITMORE SCHANZENBACH & RYAN NUNN, HAMILTON

and much input from moneyed interests, politicians determine both city spending on police and state and federal spending on prisons. To contradict and critique the existing system, many abolitionists seek to shift power away from elites and toward everyday people and communities,¹⁴⁴ especially those who occupy a growing group of “second-class citizens” locked out of the democratic process by felony disenfranchisement laws and other practices that limit their claims to citizenship.¹⁴⁵

Democratic participation by impacted communities is thus the foundation for power-shifting, which has both cultural and material dimensions.¹⁴⁶ Cultural power shifting involves marginalized populations exposing and rearticulating the way crime is constructed in the public imagination and in their own

PROJECT, THE ECONOMICS OF PRIVATE PRISONS (2016), https://www.hamiltonproject.org/assets/files/economics_of_private_prisons.pdf [<https://perma.cc/WK6A-URGV>] (same).

144. For example, activists in Austin, Texas launched #wefund, a community budgeting tool to solicit feedback from the community on how the city should prioritize its spending. More than 95 percent of people supported cutting the police budget, and the average recommendation for defunding was to cut the budget approximately by half. See *WeFUND: Community Budgeting Tool Results*, AUSTIN JUST. COAL. (Aug. 2020), <https://austinjustice.org/wefund-community-budgeting-tool-results> [<https://perma.cc/2B7X-VRZL>]. Others are theorizing and launching participatory budgeting processes. E.g., PARTICIPATORY BUDGETING PROJECT, <https://www.participatorybudgeting.org> [<https://perma.cc/6KQ4-H4GZ>].

145. E.g., AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* (2014) (showing how people with criminal justice contact have less faith in government); JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006) (showing the historical development and contemporary realities of felony disenfranchisement laws, which exclude people convicted of felonies from voting for periods of time); Reuben Jonathan Miller & Amanda Alexander, *The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion*, 21 MICH. J. RACE & L. 291 (2016) (arguing that legal exclusion, stigma, and unique responsibilities experienced among people with criminal records constitute a new, alternative form of citizenship known as “carceral citizenship”).

146. A long line of scholarship has theorized material and cultural (or symbolic) forms of power, and how they are interrelated. For more recent theories on power and inequality in American politics and broader society, see STEVEN LUKES, *POWER: A RADICAL VIEW* (3d ed. 2021); Michèle Lamont, Stefan Beljean & Matthew Clair, *What Is Missing? Cultural Processes and Causal Pathways to Inequality*, 12 SOCIO-ECON. REV. 573 (2014); William H. Sewell, Jr., *A Theory of Structure: Duality, Agency, and Transformation*, 98 AM. J. SOCIO. 1 (1992); CHARLES TILLY, *DURABLE INEQUALITY* (1998). In the history of penal changes in the United States, power struggles and “symbolic,” or cultural, struggles have been central to such contestation. In their analysis of the history of penal reform in the United States, Philip Goodman, Joshua Page, and Michelle Phelps wrote: “Penal development is the product of struggle between actors with different types and amounts of power.” PHILIP GOODMAN, JOSHUA PAGE & MICHELLE PHELPS, *BREAKING THE PENDULUM: THE LONG STRUGGLE OVER CRIMINAL JUSTICE* 8 (2017).

communities,¹⁴⁷ which may have internalized elite definitions.¹⁴⁸ Cultural struggles can reduce the ideological power of police and prisons as necessary institutions in society¹⁴⁹ and inspire people to join social movements.¹⁵⁰ Cultural contestation can also result in a material shift, such as eliminating laws that criminalize drugs.¹⁵¹ In addition, direct resistance in the face of legal authority can constitute both cultural and material shifts in relations between marginalized groups and groups with power. “Copwatching,” for instance, can provide community narratives of police abuse, help individuals resist abusive tactics during an encounter, and counter police testimony in court.¹⁵² More systemic forms of power shifting can also change material realities. For instance, Olúfẹmi O. Táiwò argued that community control over police departments in the form of randomly-selected and rotating local boards with the power to hire, fire, defund, or abolish police departments complements abolitionist aims.¹⁵³ Shifting authority away from government representatives places power in the hands of local communities. Those communities may have political disagreements about abolition but would have the ability to more directly reach a collective determination of their fates.¹⁵⁴ At root, expanding democratic participation for

147. See Matthew Clair, Caitlin Daniel & Michèle Lamont, *Destigmatization and Health: Cultural Constructions and the Long-term Reduction of Stigma*, 165 SOC. SCI. & MED. 223 (2016) (discussing cultural power); Michèle Lamont, *Addressing Recognition Gaps: Destigmatization and the Reduction of Inequality*, 83 AM. SOCIO. REV. 419 (2018) (same); Michael Schudson, *How Culture Works: Perspectives from Media Studies on the Efficacy of Symbols*, 18 THEORY & SOC’Y 153 (1989) (same).

148. See Cathy J. Cohen, *Deviance as Resistance: A New Research Agenda for the Study of Black Politics*, 1 DU BOIS REV.: SOC. SCI. RSCH. ON RACE 27, 29 (2004) (arguing that scholars of Black politics have often internalized and normalized “White, middle- and upper-class, male heterosexuality,” thereby problematizing deviant acts in Black communities); Matthew Clair, *Criminalized Subjectivity: Du Boisian Sociology and Visions for Legal Change*, 18 DU BOIS REV.: SOC. SCI. RSCH. ON RACE 289, 311 (2021) (describing how, among a sample of people who had been arrested in the Boston area, some people in the study had “internalized the [dominant society’s] view that their criminalized behaviors are problematic and should be controlled” by law).

149. DAVIS, *supra* note 11, at 9–21, 105–15.

150. See Francesca Polletta, “*It Was Like a Fever . . .*” *Narrative and Identity in Social Protest*, 45 SOC. PROBS. 137 (1998) (discussing how the narratives around the spontaneity of student sit-ins in the 1960s inspired people to become student activists during the Civil Rights Movement).

151. Karakatsanis, *supra* note 141.

152. See Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016) (discussing the practice of copwatching); see also FORREST STUART, *DOWN, OUT, AND UNDER ARREST: POLICING AND EVERYDAY LIFE IN SKID ROW* (2016) (describing how copwatching operates on the ground and how people have used it to counter police practices in the moment and in court).

153. Olúfẹmi O. Táiwò, *Power Over the Police*, DISSENT (June 12, 2020), https://www.dissentmagazine.org/online_articles/power-over-the-police [<https://perma.cc/T57T-AJLX>]; see K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679 (2020).

154. See Monica C. Bell, *The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation*, 16 DU BOIS REV.: SOC. SCI. RSCH. ON RACE 197 (2019). Simonson similarly wrote:

The idea of power shifting is not inherently abolitionist, or even left-leaning; community control, for instance, could be an institution that people who want more policing take up in the name of public safety. But a power-shifting analysis does open up the terrain of police

marginalized people, which has been diminished in large part by mass criminalization, undergirds abolitionist thinking and comprises the principle of power shifting.¹⁵⁵

B. Defunding and Reinvesting

The paired acts of *defunding and reinvesting* constitute the second principle. Abolitionists see the defunding of police and prisons as inseparable from investing in alternative ways of managing social harm. The principle of defunding and reinvesting provides at least three responses to a common criticism of abolition: what do we do about violence?¹⁵⁶ First, police and prisons are themselves violent institutions; defunding these institutions therefore reduces certain forms of routine violence. Second, police and prisons are often ineffective at preventing or reducing many forms of violence.¹⁵⁷ Third, reinvesting resources in social institutions outside the criminal legal system can reduce community violence and increase capacity for alternative forms of violence prevention and accountability.¹⁵⁸ Social scientists have long examined how investments in social supports such as housing, healthcare, and education appear to reduce the prevalence of criminalized behaviors. Recent studies have also shown that interventions such as summer job programs or extended school days can be effective in reducing crime rates in certain communities.¹⁵⁹ Drawing on

reform to contestation and exploration of ideas that are excluded from other kinds of reform efforts. It makes abolition possible

Simonson, *supra* note 140, at 809.

155. See DAVIS, *supra* note 129; Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597 (2017); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609 (2017).

156. See, e.g., Gabriella Paiella, *How Would Prison Abolition Actually Work?*, GQ (June 11, 2020), <https://www.gq.com/story/what-is-prison-abolition> [<https://perma.cc/NGQ9-WPQW>] (interviewing Woods Ervin, an organizer with Critical Resistance).

157. See DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 66 (2019) (“[P]rison does not merely fail to rehabilitate the people it confines . . . it contributes to the likelihood that they will commit greater harms in the future.”); Mariame Kaba, *So You’re Thinking About Becoming an Abolitionist*, MEDIUM (Oct. 29, 2020), <https://level.medium.com/so-youre-thinking-about-becoming-an-abolitionist-a436f8e31894> [<https://perma.cc/9BH2-CE82>]. While police have been shown to reduce some forms of violence in the absence of robust social investments in communities, these studies rarely account for the harm that policing causes in those communities. Compare, e.g., Anthony A. Braga, Brandon S. Turchan, Andrew V. Papachristos & David M. Hureau, *Hot Spots Policing and Crime Reduction: An Update of an Ongoing Systematic Review and Meta-analysis*, 15 J. EXPERIMENTAL CRIMINOLOGY 289 (2019), with Karakatsanis, *supra* note 141.

158. See MARISOL LEBRÓN, POLICING LIFE AND DEATH: RACE, VIOLENCE, AND RESISTANCE IN PUERTO RICO 202–31 (2019).

159. E.g., Matias E. Berthelon & Diana I. Kruger, *Risky Behavior Among Youth: Incapacitation Effects of School on Adolescent Motherhood and Crime in Chile*, 95 J. PUB. ECON. 41, 51 (2011); Jonathan M. V. Davis & Sara B. Heller, *Rethinking the Benefits of Youth Employment Programs: The Heterogeneous Effects of Summer Jobs*, 102 REV. ECON. & STATS. 664, 676 (2020); Sara B. Heller, *Summer Jobs Reduce Violence Among Disadvantaged Youth*, 346 SCIENCE 1219 (2014).

data from hundreds of cities, one study found that the establishment of nonprofit organizations in a given area reduced that area's violent crime rates.¹⁶⁰

Despite investments in social supports, people may still harm others. Abolitionists understand that perpetrators should still be held accountable, albeit through nonpunitive means that do not cause further harm.¹⁶¹ Indeed, as we discuss in greater detail in Part III, the need for accountability is precisely why reimagining the place of the courts, which are often falsely assumed to provide accountability and justice, is critical to abolitionist work.

C. Transformation

On the road toward abolition, many activists recognize the practical necessity of partial abolitions, or non-reformist reforms, that transform existing, punitive state institutions in ways that reduce their power and harm. *Transformation* of police and prisons in this way is the third guiding principle. Such transformation can occur within—and rely on the tools of—broader legal institutions.

In the article “Abolition Constitutionalism,” Dorothy Roberts drew inspiration from the slavery abolitionist Frederick Douglass, who, despite grappling with whether the Constitution was fundamentally a proslavery or antislavery document, ultimately chose to interpret the document through an abolitionist lens.¹⁶² Roberts referred to this strategy as one of “holding courts and legislatures to an abolitionist reading.”¹⁶³ Today, despite current interpretations of legal doctrine to the contrary, we can similarly engage in an abolitionist reading of the Constitution with respect to the crisis of policing, courts, and prisons. Roberts wrote, “Like antebellum abolitionist theorizing, prison abolitionism can craft an approach to engaging with the Constitution that furthers radical change”¹⁶⁴ by “instrumentally using the Constitution”¹⁶⁵ through

160. Patrick Sharkey, Gerard Torrats-Espinosa & Delaram Takyar, *Community and the Crime Decline: The Causal Effect of Local Nonprofits on Violent Crime*, 82 AM. SOCIO. REV. 1214 (2017); see PATRICK SHARKEY, *UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE* (2018).

161. See, e.g., Josie Duffy Rice, *The Abolition Movement*, VANITY FAIR (Aug. 25, 2020), <https://www.vanityfair.com/culture/2020/08/the-abolition-movement> [<https://perma.cc/7SS8-LBBS>] (“Certainly you would still need professionals responsible with holding accountable those who violate the social contract in the extreme—rape or murder—and an improved investigative system to catch the perpetrators.”). In her article in *The Atlantic*, Derecka Purnell writes: “we should expand restorative and transformative processes for accountability.” Derecka Purnell, *How I Became a Police Abolitionist*, ATLANTIC (July 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/how-i-became-police-abolitionist/613540> [<https://perma.cc/4D2Q-TDXE>]; see also Clint Smith, *There Is No Justice in Killing Dylann Roof*, NEW YORKER (June 4, 2016), <https://www.newyorker.com/news/news-desk/there-is-no-justice-in-killing-dylann-roof> [<https://perma.cc/33L7-LZTE>] (discussing the importance of extending mercy even to those who commit racist acts of violence, such as mass murder).

162. Roberts, *supra* note 124, at 58–62.

163. *Id.* at 110.

164. *Id.* at 108.

165. *Id.* at 110.

impact litigation or making arguments that legislative bodies should give substance to constitutional amendments. Abolitionists can at once deploy legal tools “strategically as a legal, ideological, rhetorical tactic to expose the hypocrisy” all the while recognizing that existing legal systems will not bring about “[B]lack freedom.”¹⁶⁶

Transformation, as we will discuss in greater detail in Part III, often involves using existing legal, political, and social tools to dismantle uniquely oppressive components of the law, such as leveraging prosecutorial power to decline to pursue certain charges brought by police. Because existing tools for transformation might also function as instruments of oppression, transformation is a complex principle that requires careful attention to unintended consequences and ways that such strategies may legitimate existing punitive power structures. In order to determine which tools to use, this principle compels organizers, scholars, and policymakers to consider how other institutions beyond police and prisons may be amenable to transformation versus abolition. In other words, theorizing around transformation necessitates the interrogation of institutions like criminal courts, where prosecutors’ offices, judicial norms, and legal doctrine hold significant power. Criminal courts are structured within broader legal frameworks such as state and federal constitutions, laws, and electoral systems—a collection of tools and structures inviting critique, transformation, or even calls for abolition.

It is critical to specify the components of the legal system that contain potential for transformation and justice and to articulate the degree to which they are separable from those components which are beyond repair. Some institutions that contribute to the problems of mass criminalization may nevertheless have more potential for justice than injustice, such as problem-solving courts, restorative justice programs, and schools. For these institutions, the goal then may not be abolition but rather transformation from the punitive arrangements and logics that distort their broader, just purposes.

III.

TOWARD THE ABOLITION OF CRIMINAL COURTS

Applying these three abolitionist principles to the criminal courts, Part III draws on existing efforts of grassroots organizers, lawyers, and policymakers and frames these efforts as complementary components of a more coherent movement toward *criminal court* abolition. As we noted in the Introduction, scholars and organizers have often referred to the problems of the “prison-industrial complex,” which incorporates implicit scrutiny of courts along the path from policing to prisons. Yet, we take the step of naming these strategies and tactics under the umbrella of *criminal court abolition* as a way to underscore how existing activism targeted at the courts fits into the broader movement to abolish

166. *Id.* (referring to the thinking of Black Panther Party activist George Jackson).

racialized systems of punitive legal control. In doing so, we make explicit the connections that are often left implicit. Further, we detail alternative possibilities that could supplant criminal courts as our go-to institution for adjudicating wrongdoing and holding people accountable for harm.

A. Power Shifting in Relation to Criminal Courts

The power-shifting principle applied to the courts requires imagining ways to wrest the authority over accountability for harm from court authorities into the hands of local communities in a democratic and just way that centers the most vulnerable. Democratic deliberation should account for all perspectives within a community and for moral concerns about justice and equity—concerns that, at the very least, value the fundamental dignity of every person and strive toward an equitable distribution of resources and obligations.¹⁶⁷ In the United States, some community forms of “accountability,” such as lynching, have been violent, racist, and oppressive. Moreover, concepts of “community” can be hijacked to further oppress already marginalized groups. An abolitionist imaginary, however, seeks to remove both state-sanctioned and community-derived forms of oppression. Therefore, power shifting is not an end state but a continual process whereby we are always working to ensure that power is distributed equitably and that community deliberation about how to handle harm centers the conditions of the most vulnerable.¹⁶⁸ Centering the most marginalized is critical, particularly in diverse communities that may come to divergent conclusions about local expressions of legal violence.¹⁶⁹ As Jeremy Levine argued, community participation should focus not so much on consensus but rather on “amplifying the political voice of marginalized residents.”¹⁷⁰

Organizers engage in power shifting in their local courts and communities, and this work should be understood as part of the broader abolition movement. For example, “court watching,” in which ordinary people observe court

167. See TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* 19–22 (2016); Larry Diamond & Leonardo Morlino, *The Quality of Democracy: An Overview*, 15 J. DEMOCRACY 20, 24 (2004).

168. See ANGELA Y. DAVIS, *FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT* 31–37 (Frank Barat ed., 2016).

169. For instance, research has shown that people’s perceptions of police killings of Black people—and the ways they make sense of and seek information about these killings—varies by racial group membership rooted in “identity-based motivated reasoning.” Hakeem Jefferson, Fabian G. Neuner & Josh Pasek, *Seeing Blue in Black and White: Race and Perceptions of Officer-Involved Shootings*, *PERSPS. ON POL.* 1, 5–9 (2020).

170. Jeremy Levine, *It’s Time to Move on from Community Consensus*, SHELTER FORCE (Sept. 4, 2020), <https://shelterforce.org/2020/09/04/community-consensus> [<https://perma.cc/7CBS-F56Y>]; see Jeremy R. Levine, *The Privatization of Political Representation: Community-Based Organizations as Nonelected Neighborhood Representatives*, 81 AM. SOCIO. REV. 1251 (2016) (exploring the political role of nonprofit community-based organizations in urban neighborhoods and identifying the tradeoff between the poor’s access to resources and ability to hold their leaders accountable); MARY PATTILLO, *BLACK ON THE BLOCK: THE POLITICS OF RACE AND CLASS IN THE CITY* (2007) (examining the politics of race and class through an ethnographic study of Chicago’s North Kenwood-Oakland neighborhood).

proceedings to show support for community members in the courtroom and collect information on judges and prosecutors, has sought to hold courts accountable to the public with respect to the court system's contribution to violence and harm.¹⁷¹ Like copwatching, court watching has cultural and material dimensions: it can expose injustices, pressure legal officials to “shift courtroom policies, practices, and culture,”¹⁷² and create conditions for judicial accountability.

As this example shows, while much of the work of power shifting is cultural, such work complements and creates the conditions for material work. Media reporting, academic writings, town halls, and everyday conversations are important sites for the cultural work of exposing injustice and circulating new articulations of “crime” and harm that reveal the everyday violence in the criminal courts.¹⁷³ Lawyers have an important role to play as insiders in exposing courts as tools of systemic oppression, through storytelling both within and outside courtrooms.¹⁷⁴ This work can complement and spur material shifts in power relations. Thus, material forms of power shifting often arise from cultural work and can be the ultimate aim of cultural efforts.

Participatory defense tactics have also created material power shifts by employing cultural power-shifting strategies. For example, members of Silicon Valley De-Bug, a community organizing hub in San Jose, California, spent months watching felony bail hearings and bearing witness to the proceedings. They then devised procedures to gather information from loved ones and community members that could be used by public defenders in the bail hearing, with the ultimate aim of securing release of those arraigned in felony court. Working with public defenders, “[hub members] created a form to tap and translate care and support offered by people filling the courtroom benches into

171. COURT WATCH NYC, <https://www.courtwatchnyc.org> [<https://perma.cc/LR3W-WEET>]; see BACH, *supra* note 78, at 262 (explaining the concept of “court monitoring,” whereby communities keep track of the processes and outcomes in their local courts).

172. COURT WATCH NYC, *supra* note 171.

173. See Clair et al., *supra* note 147, at 224; Schudson, *supra* note 147, at 168–69.

174. For example, in the popular podcast 5-4, three attorneys break down Supreme Court opinions in a way that demystifies the Court and exposes how Court opinions affirm, entrench and further perpetuate existing race and class hierarchies. See 5-4 POD, <https://www.fivefourpod.com/> [<https://perma.cc/8LGV-YKVY>]. Like the best rap artists, progressive lawyers can energize a demoralized citizenry with insights on the historical origins and present causes of social misery. Lawyers can perform this role more easily than others because of their prestige and authority in American society. Progressive lawyers can seize this opportunity to highlight the legal system's internal contradictions and blatant hypocrisy, using the very ideals—fairness, protection, formal equality—it heralds. This kind of progressive legal practice, narrative in character and radical in content, can give visibility and legitimacy to issues neglected by and embarrassing to conservative administrations and can educate citizens on the operations of economic and political powers in the courts. See Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797, 1802 (1990). In this regard, historical consciousness and incisive narration yield imminent critiques, disclose the moral lapses, and illuminate the structural constraints of the law. At the same time, it must empower society's victims to transform society.

pretrial freedom for their loved ones.”¹⁷⁵ Silicon Valley De-Bug members also support one another when loved ones are out on bail by offering transportation to court, employment opportunities, shelter, and childcare. These mutual support practices supplant the state’s various pre-trial control techniques, like probation check-ins, drug testing, house arrest, and incarceration, with pre-trial care.

Community bail funds across the country are another example of how community members have materially shifted power away from judges and prosecutors in determining whether a person will be incarcerated or face other kinds of pre-trial control. Community bail funds, or organizations that post bail for people who cannot otherwise pay for their release, received a surge in donations in the wake of the killing of George Floyd and the media attention surrounding subsequent arrests of protesters.¹⁷⁶ Bail funds not only enable arrested people to avoid incarceration while awaiting trial but also afford the community, rather than a prosecutor or a judge, the power (through cash) to decide who should remain free prior to formal adjudication by the court. Jocelyn Simonson argued that strategies like court watching and community bail funds collectively represent bottom-up forms of “resistance and . . . agonistic participation—forms of direct participation that engage with powerful state institutions in a respectful but adversarial manner.”¹⁷⁷ Many bail funds also employ cultural power-shifting tactics through client storytelling.¹⁷⁸

B. Defunding Criminal Courts and Reinvesting in Alternatives

Defunding and reinvesting, which has been a common tactic in relation to policing and city budgets, could also hasten criminal court abolition. Organizers and activists across the country have exposed the amount of money cities spend on police forces;¹⁷⁹ community leaders and organizers could engage in similar efforts to shed light on government spending on criminal courts. The federal judiciary budget request for Financial Year 2020 was \$8.29 billion, which funds the salaries and benefits of court personnel (including prosecutors, judges, and

175. Raj Jayadev, Janet Moore & Marla Sandys, *Participatory Defense as an Abolitionist Strategy*, in *TRANSFORMING CRIMINAL JUSTICE: AN EVIDENCE-BASED AGENDA FOR REFORM* (Jon B. Gould & Pamela Metzger eds., forthcoming 2021) (manuscript at 17) (on file with authors).

176. Jia Tolentino, *Where Bail Funds Go from Here*, *NEW YORKER* (June 23, 2020), <https://www.newyorker.com/news/annals-of-activism/where-bail-funds-go-from-here> [<https://perma.cc/9Q6W-KA2Y>]; see Jocelyn Simonson, *Bail Nullification*, 115 *MICH. L. REV.* 585 (2017).

177. Jocelyn Simonson, *The Place of “the People” in Criminal Procedure*, 119 *COLUM. L. REV.* 249, 256 (2019).

178. For example, in 2021 a client who was served by the Texas Jail Project’s bail fund testified in the Texas Legislature’s Senate Committee on Jurisprudence, exposing the harm of cash bail and the benefits of bail funds: “I’m a twenty-year-old with my whole life ahead of me. I’m sure many twenty-year-olds don’t have 1500 dollars either . . . [T]he existing laws are cruel enough. They are keeping us locked up long enough.” Texas Jail Project (@TxJailProject), *TWITTER* (Mar. 19, 2021), twitter.com/TxJailProject/status/1372917574778957825 [<https://perma.cc/L7AS-MJME>].

179. See, e.g., Akbar, *supra* note 9; Taylor, *supra* note 9.

court officers), maintenance of buildings, as well as indigent defense.¹⁸⁰ State judiciaries also request their own funding from state legislatures; in California, the state judiciary's budget for Financial Year 2020-2021 was \$4 billion.¹⁸¹

Local criminal courts also occupy significant real estate in county budgets. Defunding criminal court systems and reinvesting the money elsewhere could comprise two complementary strategies. The first strategy is reallocating funds within budgets to increase resources for indigent defense representation and decrease resources spent on prosecutors and judges. The second is defunding components of the budget that pay for the number of judges hearing criminal cases and the number of prosecutors pursuing criminal charges and reallocating that funding outside of the criminal court system.

In addition to taking aim at local budgets as targets for defunding, organizers and advocates have recently brought much attention to the “user-pay” structure of court fines and fees, in which people charged with crimes are also charged fines, fees, and court and other costs to pay for the criminal system, which we touched on in Part I.C. One way to defund criminal courts would be to end the user-pay structures that most courts rely on. This idea is nothing new; in fact, the user-pay system has been criticized by court administrators and organizers alike for many years as being ineffective, inefficient, and most importantly, unjust.¹⁸² Organizers, advocates, and policymakers will need to stay vigilant to ensure that ending these user-pay structures does not result in increased judiciary budgetary requests. The money saved from defunding should thus either remain in the communities targeted by the criminal legal system – in the case of ending user-pay systems – or could be reinvested in alternative forms of conflict resolution and accountability – in the case of reductions in local budgets.

Defunding and reinvestment thus create an opportunity to build up structures to replace those dismantled. Given moral and social imbalances that often exist between parties in a dispute or harmful relationship, multiple types of alternative conflict resolution should be considered for investment. Disputes

180. CONG. RSCH. SERV., IF11168, JUDICIARY BUDGET REQUEST, FY2020 1 (2019), <https://fas.org/sgp/crs/misc/IF11168.pdf> [<https://perma.cc/CYF2-ZB68>].

181. GAVIN NEWSOM, STATE OF CAL., CALIFORNIA STATE BUDGET 2020–21 75 (2020), <http://www.ebudget.ca.gov/2020-21/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf> [<https://perma.cc/4JFD-DQ65>].

182. See CARL REYNOLDS & JEFF HALL, CONF. OF STATE CT. ADM'RS, COURTS ARE NOT REVENUE CENTERS 7 (2011), https://cosca.ncsc.org/_data/assets/pdf_file/0019/23446/courtsarenotrevenuecenters-final.pdf [<https://perma.cc/9YZX-Z5Q9>] (“Courts should be substantially funded from general governmental revenue sources.”). See generally Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSPS. ON POL. 638, 638–39 (2015) (“[T]his inverted ‘welfare system’ taxes poor families to help fund the state’s project of poverty governance . . . to subsidize the carceral state.”).

between two parties who have a relative “moral balance”¹⁸³ may be better handled through mediation processes than through arrest and charging in misdemeanor courts. These could include trespassing or loitering—criminalized conduct that, by itself, has not harmed other people but where neighbors, local businesses, and other community members are in conflict. Of course, many of these instances may involve disputes between people who are not of equal social status in the community. In such instances, social programs, such as subsidized housing, could be afforded alongside, or instead of, mediation as a better way to solve problems often rooted in poverty. In addition, many harms currently adjudicated in criminal courts, such as physical assault or sexual violence, exhibit a grave imbalance between parties by virtue of the harm done—rather than by virtue of an a priori social status imbalance, though that may exist as well—thereby requiring accountability for harm. Such harms would not be appropriately adjudicated through conflict resolution processes. Instead, as Aaron Lyons wrote, this is where restorative justice approaches are more appropriate.¹⁸⁴

Restorative justice programs, such as Common Justice or the Center for Court Innovation’s peacemaking programs, can provide nonpunitive ways to hold people accountable for the harms they have caused as well as to work toward healing for survivors and communities.¹⁸⁵ Common Justice is an alternative-to-incarceration and victim-service program in Brooklyn, New York. It offers “a survivor-centered accountability process that gives those directly impacted by acts of violence the opportunity to shape what repair will look like, and, in the case of the responsible party, to carry out that repair instead of going to prison.”¹⁸⁶ Indeed, studies show that victims report greater satisfaction from similar restorative programs, which often draw on Indigenous methods that have been used for centuries to make communities whole.¹⁸⁷ But responsibility does not rest with the perpetrator alone. Community members and broader society must recognize, acknowledge, and work toward healing the racialized, gendered, and class-based injustices that make such acts of harm more likely. As Danielle

183. The phrase “moral balance” comes from Aaron Lyons, who references Zehr in a blogpost for Just Outcomes. Aaron Lyons, *Restorative Justice vs. Conflict Resolution: Assessing for Intervention*, JUST OUTCOMES (Mar. 14, 2016) (citing Howard Zehr, *Restorative Justice, Mediation and ADR*, ZEHR INST. FOR RESTORATIVE JUST. (Aug. 13, 2010), <https://zehr-institute.org/resources/restorative-justice-mediation-and-adr.html> [<https://perma.cc/XAC7-UBY2>]), <https://www.justoutcomesconsulting.com/restorative-justice-vs-conflict-resolution-assessing-for-intervention> [<https://perma.cc/V6SP-5VNB>].

184. See *id.* (explaining a “framing” approach to identify opportunities for restorative justice).

185. SERED, *supra* note 157, at 227. The Center for Court Innovation in New York runs its own peacemaking programs. *Peacemaking Program*, CTR. FOR CT. INNOVATION <https://www.courtinnovation.org/programs/peacemaking-program#:~:text=The%20Center%20for%20Court%20Innovation,agreement%20about%20restitution%20and%20repair> [<https://perma.cc/E7DG-CDW7>].

186. SERED, *supra* note 157, at 133.

187. See John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 20 (1999) (reviewing restorative justice accounts).

Sered, executive director of Common Justice, described: “That will mean a concentration of resources in communities of color. The repair must go to where the damage—and therefore the debt incurred—has been greatest, and we [W]hite people will need to be prepared for a substantial redistribution of resources toward communities of color throughout the country.”¹⁸⁸

Given the power-shifting principle, however, abolitionists may be wary of some of the details of already-existing mediation and restorative justice programs, especially when they are tied to state-sanctioned systems of social control. As currently constituted, such programs often rely on prosecutors making exceptions to divert alleged offenders. Moreover, some restorative justice philosophies articulate a continued and central role for the state, especially the police and prisons, in defining and punishing crime.¹⁸⁹ Some Black organizers, even those who have engaged in restorative justice approaches for years, have worried that the dominant vision and framing of restorative justice has often failed to directly engage with mass criminalization’s state-sanctioned racialized and extractive nature. As Fania E. Davis, co-creator of Restorative Justice for Oakland Youth, described, “I have observed that we are generally perceived as—and too often behave as—a [W]hite movement. This is an enormous challenge, raising grave questions about our ability to fulfill [restorative justice’s] extraordinary promise.”¹⁹⁰ Consequently, some in the abolition movement prefer the concept of transformative justice, which focuses on building a world where harms are less likely to occur and, if they do, placing the community, rather than the state, in charge of democratically working toward accountability.

In an interview in *GQ Magazine*, Woods Ervin, an organizer who is part of Critical Resistance, contrasted restorative and transformative justice: “Restorative justice is to try and restore relationships to how they were prior to a harm being done. Transformative justice, the purpose is to try and transform communities so that the harm cannot happen again.”¹⁹¹ Thus, money saved could be reinvested in other social supports such as parks, libraries, a mutual aid fund, or organizations that continually work to transform conditions in their communities for the better.¹⁹²

188. SERED, *supra* note 157, at 246.

189. For instance, John Braithwaite, who has done much to theorize restorative justice, wrote that “unlike the most radical versions of abolitionism, restorative justice sees promise in preserving a state role as a watchdog of rights and concedes that for a tiny fraction of the people in our prison, it may actually be necessary to protect the community from them by incarceration.” John Braithwaite, *Restorative Justice*, in *THE HANDBOOK OF CRIME AND PUNISHMENT* 323, 336 (Michael Tonry ed., 1998). He also advocated for reforming police and other state actors through a restorative justice lens; rather than abolishing them, Braithwaite referred to “restorative police officer[s]” in contrast to “retributive police officer[s].” *Id.* at 334.

190. Fania E. Davis, *What’s Love Got to Do with It?*, *TIKKUN*, Winter 2012, at 30, 32.

191. Paiella, *supra* note 156.

192. After a campaign led by grassroots organizers to provide city-funded mutual aid, the city of Austin, Texas created the RISE fund, allocating \$7.5 million for direct cash assistance. Press Release,

Unlike investing in restorative justice, investing in transformative justice programs and community groups focuses on harm prevention rather than accountability after the fact. In Boston, Massachusetts, woman-led Families for Justice as Healing works to diagnose and transform harm among neighbors in Roxbury, Dorchester, and Mattapan. They specifically envision their mission as developing “alternatives to police, courts, and incarceration” by drawing on “the solutions and expertise” of formerly incarcerated women “to address the root causes of incarceration.”¹⁹³ Similarly, the Louis D. Brown Peace Institute in Dorchester, Massachusetts, engages in community efforts to prevent harm. They provide “[s]ervices that are consistent and compassionate for families of murdered loved ones and families of incarcerated loved ones to prevent cycles of retaliatory violence.”¹⁹⁴ Although transformative and restorative justice are distinct, they serve two unique and important purposes: prevention and accountability. We therefore view them as complementary and recognize the importance of democratic, community-led restorative justice initiatives that draw on Indigenous principles and “remind us of the centrality of race in any effective U.S. social transformation movement.”¹⁹⁵

There is a temptation and even potential to turn toward the civil court system as we work toward defunding the criminal courts and investing in alternatives. While such a turn should proceed cautiously, it can also help clarify the potential for transformation in the broader court system. Many may view civil courts as unsalvageable components of the legal system. To be sure, civil courts and other non-criminal components of the legal system in the United States function to uphold systems of control and exploitation including and beyond criminal punishment, such as capitalism, White supremacy, immigrant exclusion, hetero-patriarchy, and family regulation and separation.¹⁹⁶ Some,

Grassroots Leadership, Victory! Austin City Council Votes in Favor of Providing Direct Cash Assistance to the Most Vulnerable Austinites (Apr. 9, 2020), <http://grassrootsleadership.org/releases/2020/04/victory-austin-city-council-votes-favor-providing-direct-cash-assistance-most> [<https://perma.cc/S469-HPAE>].

193. *About Us*, FAMS. FOR JUST. AS HEALING, <https://www.justiceashealing.org/about-us> [<https://perma.cc/NEV6-QYJD>].

194. *Services*, LOUIS D. BROWN PEACE INST., <https://www.ldbpeaceinstitute.org/services> [<https://perma.cc/2A3U-D5YQ>].

195. Davis, *supra* note 190, at 68.

196. See JENNIFER A. REICH, *FIXING FAMILIES: PARENTS, POWER, AND THE CHILD WELFARE SYSTEM* (2005) (discussing the social control mechanisms of foster care and Child Protective Services); Asad L. Asad, *On the Radar: System Embeddedness and Latin American Immigrants' Perceived Risk of Deportation*, 54 *LAW & SOC'Y REV.* 133 (2020) (addressing the social control mechanisms of immigration law); Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 *AM. SOCIO. REV.* 610 (2020) (discussing the social control mechanisms of foster care and Child Protective Services); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 *UCLA L. REV.* 1474 (2012) (same). See generally Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331 (1988) (arguing antidiscrimination law “has largely succeeded in eliminating the symbolic manifestations of racial oppression” but has merely “repackaged” and perpetuated racist norms); Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the*

however, have identified civil courts as an institution that could serve as an alternative site for adjudication between an alleged perpetrator and a victim that does not involve the possibility of incarceration.¹⁹⁷ Indeed, among the wealthy and corporations, criminalizable behavior has historically been adjudicated in civil proceedings for precisely this reason.¹⁹⁸ Herman Bianchi argued that the criminal law in the United States is uniquely at odds with the rest of our law, which is built on the “settlement of disputes, regulation of conflicts, and the construction of society.”¹⁹⁹ For Bianchi, an abolitionist vision would focus on bringing our pathological criminal legal system back in line with the more just and prosocial aims of other components of the legal system.

Theorizing about the potential of civil legal concepts such as reparative law and liability is increasingly necessary to engage head on, as it forces clarification about whether the goal is to ultimately abolish the broader legal system or instead to work to transform its practices in ways that abolish police, prisons, and the criminal court while keeping other aspects of the judiciary intact.²⁰⁰ Ryan Doerfler and Samuel Moyn, for instance, questioned the value of keeping the existing judiciary intact if the fundamental goal is to expand democratic participation. They argued that progressive reformers should seek to diminish the power of the Supreme Court, and by extension, the judicial branch, in democratic life rather than simply seeking to change the political composition of the Court: “Saving the Supreme Court is not a desirable goal; getting it out of the way of progressive reform is.”²⁰¹ This question brings us to the third abolitionist principle: transformation.

C. *Transforming Criminal Courts on the Road to Abolition*

Transformation, the third abolitionist principle, can simultaneously clarify the ultimate ends of abolition with respect to other components of the judicial branch and work toward a clear and settled imperative to abolish police, prisons, and, we argue, criminal courts. The criminal courts are a site where the carceral

Interest-Convergence Dilemma, 93 HARV. L. REV. 518 (1980) (arguing that Black progress in the courts occurs only when racial remedies for Black people align with White middle- and upper-middle-class interests).

197. Herman Bianchi, *Abolition: Assensus and Sanctuary* 1 JUST., POWER & RESISTANCE 47, 57 (2017).

198. Edwin H. Sutherland, *Is “White Collar Crime” Crime?*, 10 AM. SOCIO. REV. 132, 136 (1945).

199. Bianchi, *supra* note 197, at 49.

200. See, for example, Keeanga Yamahtta-Taylor’s recent piece in the *New Yorker* questioning whether the Supreme Court should continue to exist as it is currently constituted, given that it has, more of than not, served as a regressive institution. Keeanga Yamahtta-Taylor, *The Case for Ending the Supreme Court as We Know It*, NEW YORKER (Sept. 25, 2020), <https://www.newyorker.com/news/our-columnists/the-case-for-ending-the-supreme-court-as-we-know-it> [https://perma.cc/6YTX-LZAB].

201. Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1708 (2021).

state is both “constituted and contested,”²⁰² and transformation could hasten abolition in innumerable ways. Lawyers could work within criminal courts to support and complement organizing efforts outside the courts, including by pushing for expanded public access to bail hearings to enable organized court watching.

Through resistance lawyering, which has historically been central to efforts to undermine and dismantle unjust legal systems,²⁰³ lawyers can work to frustrate or thwart the aims of the “punishment bureaucracy.”²⁰⁴ This could look like hundreds of motions filed in one day challenging illegal pretrial confinement on unaffordable bail. Such a tactic has strong legal grounds for immediate individual relief and would also frustrate the normal court and jail operations. Public defenders could share information on police officers who routinely lie during court testimony or abuse the people they arrest, using that information in their own clients’ defense and making it accessible to the public as a tool for defunding or shifting power from the police.²⁰⁵ Progressive judges can take the lead from organizers as “fellow advocates,”²⁰⁶ pushing legal doctrine in an abolitionist direction²⁰⁷ and sharing institutional knowledge of systemic police practices.²⁰⁸ Residents can hold judges accountable outside of the traditional legal appellate processes, including by filing complaints with judicial ethics

202. Soniya Munshi & Craig Willse, *Foreword to INCITE!, THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX*, at xiii, xiv (2007).

203. Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1880–82 (2019).

204. See KARAKATSANIS, *supra* note 34, at 16.

205. For example, CAPstat, a website of police misconduct complaints, was originally created for public defenders by The Legal Aid Society’s Special Litigation Unit Cop Accountability Project team, led by Cynthia Conti-Cook and Julie Ciccolini. It is now a public database. *About Us*, CAPSTAT, <https://www.capstat.nyc/about/us/> [<https://perma.cc/9YTJ-8A5Y>].

206. Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1478 (2020) (citing Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749 (2014)). It is important to underscore that judges—and other actors, such as defense lawyers, policymakers, and private funders—should work *alongside* movements and organizers rather than impose their own will or vision on movements. Recent work on the civil rights movement, for instance, has documented the way private funders diminished the emancipatory potential of organizers’ work. See, e.g., Megan Ming Francis, *The Price of Civil Rights: Black Lives, White Funding, and Movement Capture*, 53 LAW & SOC’Y REV. 275, 289–90 (2019) (describing how funders leveraged their financial resources to redirect the NAACP’s efforts away from preventing lynching and White supremacist mob violence and toward school desegregation); see also Robert L. Allen, *From Black Awakening in Capitalist America, in INCITE!, THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX*, 53 (2007) (analyzing how the Ford Foundation influenced Black nationalist movements in the 1960s).

207. Clair, *supra* note 124; see Clair & Winter, *supra* note 83, at 23–24. As Monica Bell, Stephanie Garlock, and Alexander Nabavi-Noori wrote, “Judging is not merely the rendering of decisions based on preexisting legal rules; it can also encompass the articulation of legal values, the management of courtrooms, the making of rules about broader judicial operation, and the representation of the ethical principles of the legal system.” Bell et al., *supra* note 208, at 1507.

208. See Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016).

boards,²⁰⁹ doing petition or call campaigns,²¹⁰ and monitoring court dockets²¹¹ and election contributions.²¹² Residents can also pressure elected officials to pass laws that decriminalize certain behaviors, such as substance use, or that abolish unjust standards that expand police authority, such as qualified immunity or no-knock warrants. Through strategic work around prosecutorial and judicial elections, organizers could leverage the power of electoral politics to pressure officials to change their courtroom practices.²¹³ The movement to elect so-called “progressive prosecutors” who commit to reducing the imprint of their offices—

209. In October 2020, Texas Fair Defense Project and Texas Civil Rights Project filed judicial ethics complaints against multiple criminal district judges in Harris County, Texas, for their routine violation of state law in refusing to appoint the public defender office to cases. See Samantha Ketterer, *Two Harris County District Judges Face Favoritism Allegations in Defense Appointments*, HOUS. CHRON. (Oct. 14, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/harris-county-judges-favoritism-allegations-15646882.php> [https://perma.cc/NJ2W-DECW]. The appointment rate to the public defender office almost doubled immediately – going from about 7.8 percent of cases in September 2020 to 18.1 percent of cases in October 2020. See Harris Cnty. Just. Admin. Dep’t, *Attorney Appointments for Harris County Felony and Misdemeanor Courts*, <https://jad.harriscountytexas.gov/Data/The-Court-Appointments-Dashboard> [https://perma.cc/9RYA-VBTX].

210. In 2019, organizers at Grassroots Leadership in Travis County, Texas, launched an email petition targeting local judges as part of a campaign to start a public defender office. See *Everything You Need to Know About the Upcoming Vote on Travis County’s Budget*, GRASSROOTS LEADERSHIP (Sept. 11, 2020), <https://grassrootsleadership.org/blog/2020/09/everything-you-need-know-about-upcoming-vote-travis-county-s-budget> [https://perma.cc/3SD3-8CY9] (“[I]n 2019 . . . [i]n collaboration with other community groups and by uplifting directly impacted community voices, we pushed the county to invest in a holistic public defender’s office.”). The campaign was ultimately successful, resulting in the first adult public defender office in the County and committing the county and state to \$40 million over four years to fund the office. See Andrew Weber, *Travis County’s Public Defender Office Is Officially Funded*, AUSTIN MONITOR (Aug. 30, 2019), <https://www.austinmonitor.com/stories/2019/08/travis-countys-public-defender-office-is-officially-funded/> [https://perma.cc/N9D8-W82T].

211. For example, in Harris County, Texas, advocates and organizers at Texas Criminal Justice Coalition and Texas Organizing Project publish weekly “felony pretrial detention report[s]” naming the judges with the highest number of people from their court being held pretrial. *Harris County Reform Work: Holding Local Judges Accountable*, TEX. CTR. FOR JUST. & EQUITY, <https://www.texascjc.org/harris-county-judicial-accountability-reports> [https://perma.cc/VZ2K-QF7T].

212. A recent study of criminal judges’ campaign contributions in Harris County, Texas, found a correlation between court appointments and donations to judges’ campaigns, showing “many defense attorneys make tens or even hundreds of thousands of dollars in a given year across assignments from a single judge.” Neel U. Sukhatme & Jay Jenkins, *Pay to Play? Campaign Finance and the Incentive Gap in the Sixth Amendment’s Right to Counsel*, 70 DUKE L.J. 775, 780 (2021).

213. In 2018, judges in Harris County faced “a reckoning over bail on election day” after they were sued for the County’s bail practices and thwarted any efforts toward reform. Maura Ewing, *Harris County Judges May Face a Reckoning over Bail on Election Day*, TEX. OBSERVER (Nov. 4, 2018), <https://www.texasobserver.org/harris-county-judges-may-face-a-reckoning-over-bail-on-election-day/> [https://perma.cc/9RRM-JLC6]. Indeed, “Democrats won control of the county government and swept the judiciary, bringing in socialists, former defense lawyers, and 17 African-American women who campaigned under the slogan ‘Harris County Black Girl Magic.’” Keri Blakinger, *The Beto Effect: Transforming Houston’s Criminal Justice System*, MARSHALL PROJECT (Feb. 25, 2020), <https://www.themarshallproject.org/2020/02/25/the-beto-effect-transforming-houston-s-criminal-justice-system> [https://perma.cc/423Y-XK38]. The bail litigation settled soon after, bringing sweeping changes to the Harris County misdemeanor bail system and resulting in most people charged with a misdemeanor being released pretrial without having to pay bail. *Id.*

by refusing to charge certain offenses, for instance—can bring about partial abolitions. But as the Community Justice Exchange articulated in its framework for “prosecutor[ial] organizing,” electing prosecutors, and by extension, judges, cannot be the end goal; rather, it is a means toward abolition of prosecutors’ offices as they currently exist. They wrote, “As abolitionists, our job does not end with the election of any prosecutor [. . .] Our organizing focuses on how a prosecuting office’s policies and practice result in decriminalization, decarceration, and shrinking the resources and power of the office of the prosecutor.”²¹⁴ Thus, in all their efforts—especially when working toward transformation of criminal courts—organizers remind us that the ultimate goal is abolition, not institutional legitimacy.

The array of abolitionist organizing that is already at work in scrutinizing criminal courts provides a framework for considering criminal court abolition and the potential for new systems of justice and conflict resolution. Power-shifting strategies in pretrial settings such as participatory defense and community bail funds have disrupted cash-based pretrial systems while freeing community members charged with crimes and revealing the capacity of community-led systems of support. Campaigns to end reliance on fines and fees to fund court systems have the potential to reduce court budgets, and many communities are experimenting with approaches to providing accountability outside the criminal legal system that show possibilities for reinvestment. Using existing democratic tools such as prosecutorial and judicial elections, advocates are experimenting with the possibility of transforming the legal system from within, as well as pushing for elected officials to commit to minimizing the system’s imprint and harm. These strategies and others at work today or still yet to be imagined reveal a path away from the violent, coercive, and predatory criminal court system we know today.

CONCLUSION

The 2020 protests underscored the crisis of mass criminalization in the United States, most notably with respect to the racialized harms and violence of policing. Criminal courts—which legitimate police authority, funnel people into jails and prisons, and engage in their own forms of violence, social control, and extraction—are central to this crisis. Many in the Black Lives Matter movement have made bold demands to abolish police and prisons and invest in community safety and well-being. Alongside the abolition of police and prisons, we highlight

214. CMTY. JUST. EXCH., ABOLITIONIST PRINCIPLES & CAMPAIGN STRATEGIES FOR PROSECUTOR ORGANIZING 1 https://static1.squarespace.com/static/60db97fe88031352b829d032/t/61348c6c138bef56b46eaa0/1630833772218/CJE_AbolitionistPrinciples_FINAL.pdf [<https://perma.cc/8FYZ-MGHZ>]; see Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. (forthcoming 2022) (arguing that the role of the prosecutor is often overlooked in calls for abolition and that progressive prosecutors cannot transform the criminal legal system even if they can reduce some its harm).

the complex and necessary task of reducing the harm of our criminal courts—a task that organizers have engaged in for years and that can be articulated as a strategy toward criminal court abolition. Drawing on the abolitionist principles of power shifting, defunding and reinvesting, and transformation, this Article has understood how scholars, lawyers, and policymakers, working alongside activists and organizers, can conceptualize the courts and the broader legal system in relation to the abolition movement and continue to take immediate steps to realize criminal court abolition.